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CONTENTS

STUDIES

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BOOK REVIEW

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STUDIES

Lajos LŐRINCZ

Public Administration: Yesterday, Today, Tomorrow

1. Public administration evolves where public affairs arise, problems that the entire society considers to be their own, the solution of which calls for the concerted action of every member of the society. One might think that on this basis public administration evolves in every society where the level of development is beyond that of hordes. But it is not so, hence for a long time a great share of social efforts that are now regarded as public activities have been integrated with the aim of satisfying personal needs.

Therefore we can state that the first type of public administration, which was in many aspects similar to the twentieth century, came into existence in the ancient societies of irrigation-based economic systems, in China and Egypt in the first place, but also in the valley of the rivers Tiger and Euphrates. In these empires the basic needs of the constantly growing population were met by communal works comprehending to the totality of the society. The reason for the greatest, richest and most powerful states of ancient times to become so was that they were governed by a group of leaders who had been carefully selected for the leading position on the basis of their personal abilities instead of born privileges (today we would call them managers). The permanent existence and the specific character of the Chinese civilization is due to the early developed state bureaucracy; but this statement refers to all other long-lasting ancient empires.[1]

1 My primary sources for the outlined presentation of the universal history of public administration were: HEADY, F.: *Public Administration: a Comparative Perspective*, Second Edition, New York–Basel, 1979; GLADDEN, E. N.: *A History of Public Administration*, Vol. I–II. London, 1972.

The first prerequisite for establishing a public administration system is that it be recognized at every level of society, but especially at the top of social hierarchy, that private and public matters are different and public matters shall prevail. According to the studies by Weber, Wittfogel[2] and their follow-ups, state officials in the ancient empires, including also the Roman and Byzantine Empires, who under different names fulfilled substantially the same functions, all complied with the rule of segregating their private fortunes from the public funds, their private aims from public goals. This creates the theoretical basis for the second characteristic of public administration: formation of a hierarchic structure of government and administration, both vertically and horizontally. Vertical hierarchy ensured order and unity for the executive branch of power in the great empires, whereas horizontal hierarchy served as basis for the division of labor among the departments responsible for most important groups of state affairs, such as finances, defense, economic affairs, housing, etc.

Resulting from the hierarchic structure, in the ancient empires public administration was *centralized*. The power to make decisions and issue directives was vested in those at the top of the hierarchy. The well-organized and effective public administration was usually, with very rare exceptions, combined with *despotic* governing methods, such as the concentration of all the power in one hand, and implementing such a style of government, which was not that much concerned about the balance between the stated aims and the personal and material costs it took to reach them.

Those societies, where the above described model of governing public affairs was accepted, are referred to by Eisenstadt as centralized historic bureaucratic empires or historic bureaucratic societies. He states that in contrast with the other models, such as—using his terminology—the primitive political systems, the nomadic or conquering empires, city-states, or the feudal system, this model is much more successful, it has reached much more long-lasting results than the others, for only due to the setting up of the system of public administration was it possible to reach the necessary level of control over society and to reach a progressive increase in social resources. Institutionalization of the system of public administration also helped to stabilize the relations among the various groups of society.[3]

Up to the 17-18th century, European feudalism created an entirely new situation in the history of administering communal affairs. In its early phase, it freed itself drastically of the practice of centralized public administration, that is it eliminated the system. The number of communal affairs was decreased to the minimum, and it was the task of the smallest units of society to administrate them. As the concept of public administration vanished, the organizing state disappeared, too. The feudal system was not able to produce more than half of what was necessary for the society in order to survive. The political power itself was divided among numerous small communities that

2 WITTFOGEL, K. A.: *Oriental Despotism, a comparative Study of Total Power*, New Haven, Yale University Press, 1957.

3 EISENSTADT, S. N.: The Political Systems of Empires, New York, Free Press of Glencoe, 1963.

constantly fighted against each other for the material resources. As it is well-known, the consequence was that the number of population continued to decrease as long as until the 19th century, productivity of the agriculture declined, and the level of social cooperation in general was reduced to the minimum.

As a result of a slow development that lasted for four centuries, the situation was about to change, when some European states took the form of *absolutist* monarchy by the 16–17th century. Relating to the subject of the present paper, the "newness" of these monarchies was that they again introduced the notion of communal affairs and thus created the basis for modern public administration. In France, the names of Richelieu and Colbert, in England, Henry the Eighth and Elisabeth the First, in Prussia, the Prince-elector of Brandenburg and his son, William Frederick the First, in the Austrian Empire, Marie Theresa and Joseph the Second signed the new concept of public administration and the formation of the new system. This system can be characterized—besides that it is centralized—, so that it is highly active, a new slogan was formulated saying: everything for the public, even if, when it is necessary, against the will of the public! Mercantilism got adopted as the economic policy of the state and it increased the state's incomes, improved the living conditions for the people, resulted in the construction of roads and canals—and also a series of offices were set up what lead to the adoption of rules and regulations, and to the employment of officials drafting and implementing these rules. Comparing with feudal administration, the changes are tremendous. Medieval kings were busy with the defense and enlargement of their territories, their major concern was to safeguard their privileges against the church and the nobles who always challenged them. The monarchs of enlightened absolutism wanted the welfare of their state, of their empire. In the medieval times, the officials of royal councils were common members of the royal court, they were in the same rank as cooks, tasters and footmen. In an unfortunate way, public service was not separated from the private service of the royal court. The officials of enlightened absolutism attended universities, where they studied administrational sciences, with the contemporary expression cameralist sciences. At the end of their studies they were required to take an exam and on condition of their results, the best ones were admitted to public administration, where they made a career they could count on in advance.[4]

From the aspect of public administration, the period when nation-states were born, that is the period of *bourgeois* transformation can be characterized as the age of *radical change in ideologies*, but without any changes in the structure of public administration. The country is no longer the king's property, but it belongs to the nation, and state is the machinery with the help of which the nation is able to create its government and to organize public services. The official is not the servant of the crown any more, but it serves the state. Public power is no longer the means of one person. Public officials proceed in compliance with law, instead of following the instructions given by a single person. They are protected by law because law is the manifestation of the nation's will.

4 HEADY: *ibid.* 151–163.

In other aspects changes in public administration appeared in the form of the still existing phenomena that institutions were constantly renamed: Napoleon, for example, called the former Royal Council as State Council, without the slightest changes in its functions, since every fundamental principle, order, hierarchy, specialization and registration had already emerged centuries, or even thousands of years earlier.

Approaching the present, it becomes possible to extend the scope of study to the administrational sciences, and from that moment it is impossible to describe the development in a single structure any more, although public administration remains the same.

I have already mentioned cameralism above: this discipline is in fact a systematic description of the practical tasks of public administration. It has been left out of university curriculums without any particular comments. The situation is different with regard to jurisprudence. From the beginning of the 19th century, in Europe, but especially on the Continent, in the early stages of the rule-of-law state, the needs of society were transmitted more and more and exclusively by jurisprudence. It thus strengthened and of course at the same time it was strengthened by the classical interpretation of free competition. If a fundamental principle is transmitted by law, it can only appear in the form of a legal norm. *Public administration is only entitled to act in accordance with law and only in a way that is in accordance with the applicable legal norms.* This concise requirement expresses the idea of social control, the supremacy of representative organs, that means, of politics over public administration, the separation of public and private laws, which refers, in a way, to the separation of public morals, and the attempt to restrict the rule of the state. Those times, legal regulations were drafted by the representative organs, membership of which was more and more conditional upon joining one of the political parties, that all represented a particular layer of society. The laws enacted by parliaments reflect the fiction of the sovereignty of people. Public administration, that is submitted to the rule of law, accomplishes—according to jurisprudence—a democratic way of administering public affairs through public participation. Continental Europe—as it will be demonstrated, England and especially the United States have a different standpoint—implement another rule in the field of private law: everything is possible what law does not prohibit. The capacity of public administration of the rule-of-law state is hamstringed, nevertheless trade, business, the totality of what is called today the sphere of competition is free. According to the contemporary theory adopted by jurisprudence—and this harmonized with the prevailing views of philosophy and economic theories—, public administration shall merely play the role of a night-watchman, that is to keep public order and defend the territorial integrity of the state against eventually occurring external attacks.

Prevailing views, however, do not necessarily reflect reality; instead, they either constitute the observations full of wit and wishes of theorists, or express the interests and aims of certain layers of society. In the case concerned, for example, there is no hint of any substantial changes in the social role, nor in the nature of public administration. It is equally active, it interferes in every country, though for different reasons, with the decisions on questions relating to trade, education, social welfare. One of the signs remarkable of the process is further differentiation of the structure of the

organs of government. Another one is that within the concept of the night-watchman state, in addition to the list containing five departments that originate from Rome of the period of the emperors (department of foreign affairs, internal affairs, defense, financial department, and department of justice), central administrational organs are established for the administration of matters relating to social welfare, education, industry and commerce, and agriculture. Selection of public officials is further on based on personal abilities, like in every severe and effective public administration system. Decisions are made in a reasonable decision-making procedure.

The situation is different in the same historic period—during the 18–19th centuries—in England, and especially in America. America differs the most from the solutions characteristic of continental Europe, therefore I will present the American system. The difference in this period between America and Europe is that America does not really possess a public administration system, and it does not even intend to create one. The settlers in America lived under such conditions, that they did not have any state, thus they had to solve every problem themselves or within their smallest environment, the settlement. In the absence of public affairs, that is matters affecting large parts of society that longed for urgent solution, public administration could naturally not evolve. Therefore, for a long time America did not have a different type of public administration than Europe, but the difference was that it completely lacked any. (The public administration evolving later on has no substantially different characteristic.)

The hostile emotions towards the state, the fears that central power may become too strong, felt by the Drafting Fathers of the American Constitution which is, to a certain extent, still present in the conservative segments of society, incredibly increased the significance of voluntary associations, self-organized groups of the citizens, and local governments. It almost seemed that the Greek police-system could be restored and extended to a whole continent, as alternative to the model of bureaucratic administration. (Thus the archaic style of public buildings does not coincidentally but on purpose remind of the Greek traditions.) Local governments or municipalities as a modern form expressing the wish and ability of the inhabitants for self-government requires in the first place that every member of the society have equal chances to participate in the administration of public affairs, and that no privileged layer of society take the monopoly of assertion of rights. Therefore examining personal abilities, fulfilment of educational criteria have no place in this system, positions can only be filled for a short time in order to create the highest possible rotation. As political parties gain more significance, rotation becomes unavoidable, since election campaigns are organized in every year and part of the officials in public service will be changed and together with them all their relatives, friends, those whom the officials give some kind of an assignment as a gift. A distorted version of patronage system was created, that by the 1880's made it absolutely impossible to fulfill the fundamental public functions and this convinced the American society itself that the spoil-system, that is the structure of administration subjected to politics was a way leading to dead end.

As a result of the 1880's, all over the then developed world uniform changes occurred in public administration. Disadvantages resulting from the unrestricted freedom

of competition became more apparent and social tension increased and it was almost unequivocal believed everywhere that the solution of these problems is to strengthen the state, strengthen public administration and make order in the anarchic state of economy. Some social researchers describe this period as the age of imperialism or state capitalism, some state that this is the time when state interventions were first set through, others call it the period of administrational revolution. All of them are right regarding one thing: distrust in state bureaucracy disappears all around the world, and for the first time in the history of mankind, people start looking for the means that could make bureaucracy more effective and sufficient on a large scale. In addition to these phenomena, an opposite tendency can be recognized, too, that only gains acceptance after the first world war and at the time concerned it only appeared in rarely read works: this is the growing concerns in relation with the trend felt by anarchist, social democratic, socialist and Christian-democrat theorists.

Among the efforts taken in order to increase sufficiency, the measures adopted in America seemed most original. Since this country alone lacked real public administration until as late as the end of the last century, they tried to form it so as it evolved in the very effective large-scale industries. On top of that, this was the time when the book written by Taylor was published on the traditional management of industrial work,[5] which contained a lot of general statements regarding management that seemed applicable in the field of public administration, such as specialization, coordination, fulfilment of orders, detailed planning of the separate stages of the production process, etc. From that time on, in the opinion of observers who considered industrial management as the only good and applicable way, that is the single acceptable model, at the beginning only in America, but later also in other countries, all dysfunction of public administration originated from the fact that it differed from the model, and quickly became a properly-functioning big industry, once it had complied with the management principles that were supposed to possess a general scope. According to the basically economy-concerned theory, whereas the major characteristics of the market are competition, dynamism and freedom of choice, public administration can be characterized with monopoly, stagnation and binding force. Society becomes dynamic to the extent as every organization functions according to the rules of the market.

Continental Europe that was based on a system separating public and private spheres received the new solutions coming from America with grimaces, and apart from a few exceptions, it did not take cognizance of them at all. When the American ideas first gained sympathy and support, between the two world wars, then already the New World has changed its model. In Europe the legal system will be more elaborated, the theory of administrational legal norm is worked out, the institution of administrational act, that means they look for an instrumentality to expand the power of administration. Administrational law becomes an equally important field of law beside civil law and penal law

5 TAYLOR, F. W.: *Scientific Management*, New York, Harper, 1911.

which used to prevail so far, but now administrational law even becomes predominant as regards its extent and significance.

In the real sphere the situation is the same thorough the entire developed world: the importance of public sphere keeps on growing, both in America that still cannot escape from the magic circle of free competition and in Europe that further on emphasizes the difference between public and private spheres. For example in the United States of America in the year 1924 9.9% of the GNP was spent on government expenditures, but in 1938 this number was already 19.7%.[6]

World War I, the subsequent restoration programs, the world economic crisis, then preparations for World War II. made it more and more obvious that the executive power, the activity of the government and public administration needed to be strengthened. This universal process was, however, rooted in completely different philosophies. The soviet state could point to its plans of social reconstruction on the one hand, the realization of which required a strong central power and the greatest-ever extension of the category of public affairs. On the other hand, the soviet state was bound by the ideological thesis according to which the final aim of the socialist society is to annul the structure of state bureaucracy that had become estranged from the people and to realize total self-government instead. Stalin formulated the solution, in a rather inexplicable manner: the way to the annulment of the state leads through its strengthening, i. e. the stronger it becomes, the closer it gets to the end. During the dictatorships of that period, not only in the Soviet Union, but also in Italy and later in Germany, but even in the United States implementing the policy of New Deal, public administration was strengthened against legislative power, what referred both to the fruitless debates characterizing legislation controlled by political parties, and to the wickedness of democracy. Every country set up, or at least demanded a strong government, concentration of power, and unconditional obedience towards the president, the leader of the party, of course with tremendous differences in the procedures and measures implemented. The idea of rule-of-law state and its variation applicable to public administration was pushed into the background all over in Europe, the requirement of sufficiency prevails over that of lawfulness, which is exactly the way it has always been in the United States, because of the prestige of the model of industrial management. A new branch of this science, however, after having studied the experience derived from the implementation of magical management thesis in practice, arrived at the conclusion with astonishment, that these have no effect in public administration. It is completely irrelevant, whether the functional leadership model or the model of general stuff is implemented, the outcome is neither better nor worse, for a twofold reason: firstly because informal human relations influence sufficiency in organizations much more than formal administrational measures, and secondly because the protection awarded by politics to public administration makes the rules elaborated in private management inapplicable, or at least almost inapplicable.[7] With other words

6 STRAUSSMAN, J. D.: *Public Administration*, Longman, New York, 1990.

7 SIMON, H. A.: *Behaviour of Decision Making*, New York, Macmillan, 1945.

America finally recognized—in the years preceding World War II—the consequences originating from the dichotomy of private and public administration, which was discovered in Europe three centuries earlier, in China three thousands of years before that.

After World War II, despite of what could have been expected, the role of public administration in social decision making kept on growing, and this phenomenon has not been distorted since then. Specialization further continued, fields that used to be free of administration before, such as science, technical development, sports, protection of the environment come under the scope of public administration. The number of public officials was radically arisen, they are much more well-trained, it becomes impossible to get a decision making position without university degree, nevertheless the most interesting aspect is the expansion and increase in its functions. If at the middle of the 19th century the most significant characteristic of public administration was the activity of the police, then from the turn of the century it was rather influencing and intervention, and from the fifties on it can be described as caring public administration. This means providing balanced and tolerable life conditions, including health care and social aid, education, housing, protection against industrial, environmental harmful impacts, providing the conditions for resting, rehabilitation and amusement, etc., that is fulfilling all tasks usually connected with the notion of welfare-state. A few data representative of the above outlined tendency: in Belgium in 1965 32,3% of the GNP was made up by government expenditures, in 1984 already 55,4%, in France during the same period the numbers changed from 38,4% to 52,7%, in the United Kingdom from 36,1% to 47,8%.[8] As it is well-known, in the Anglo-Saxon world the process culminated in the 1980's during the Reagan and Thatcher era—a "revolution" based on a neoconservative ideology took place, which was expressly aimed at the abolishment of the welfare-state functions and restraint of public administration, therefore it is also referred to as a "counter-revolution". Unfortunately, it is less well-known that denationalization only happened in words, not in reality. For example, the number of public employees in the United States grew from 13 million to 18.5 million between 1970 and 1991, that means an increase with more than 42%. The increase was 8% in federal organs, 64% in state organs, 48% in local bodies. It is necessary to present the political and theoretical streams separately from the trends in reality, since in the last decade Hungarians could receive hardly any information about the latter, although virtual processes aim at completely new directions.

The period after World War II cannot be described solely with the development of caring administration that is, by the way, a process extending to universal social systems, but also with the development of an *international, transnational* bureaucracy. The United Nations and the similar organizations have so many employees that they could form an entire armed forces, their number—limited to the employees working in the administration, only—exceeds 150 thousand, and the number of employees of the European Union is also more than 17 thousand. International administration is a new

8 STRAUSSMAN: *ibid.* at 11.

phenomenon not only because it did exist before, but also because internationalization was generally believed to collide with the substance of public administration, for its role has always been limited to the management of the functioning of a particular state. Public administration became suitable for fulfilling transnational functions due to the internationalization of politics.

Synchronized with this process, it was noticed that there are only limited chances for implementation and adaptation of administrational systems, structures and procedures. Attempts to transplant an administrational structure already embodied in one country to another already started after World War II. The intention was presented either in the form of humanitarian intervention, or protection of democracy and human rights, or it was sold as the selfless internationalism of proletariat, but in fact it aimed at the forceful of peaceful transformation of the institutional structure of the state concerned. From this point of view the United States of America and the Soviet Union were most helpful, since the analysis of their failures lead to the formation of a new discipline, the comparative administration. Its major statement can be summarized as it follows: changing the sector of bureaucracy is useless without any changes in other factors, such as cultural, political, economical and other factors. In order to prove the correctness of this statement, a series of examples could be demonstrated. Instead of referring to the obvious failures or blunders, let us mention the resistance on behalf of the Western-European states concerning the introduction of the American business-orientated system after World War II, or the case of the center in Speyer. As Speyer belonged to the French military zone, it was given as a present a center of elite-training which was the equivalent of the ENA founded by de Gaulle. Today the Speyer Academy of Administration, absent any central German corrections, is equals to a typical German university, and nobody really knows about the French origins, except for the historians and the French supporters of de Gaulle. Now the examples brought by the opponents can be seen clearly: how superficial and insignificant influence the Soviet expansion exerted, in its own military zone, although they are generally more totalitarian and aggressive.

2. This was the history of public administration in the most developed regions of the world in a nutshell, what alone creates a distortion. Now I will present the major turning points of the development of Hungarian administration, in a similarly short form.

As a summary it has to be said about Hungarian administration that it has never possessed any original features that would be worth reminding of, like the characteristics of the above mentioned great empires. Such characteristics were only discovered by historians lacking the relevant expertise in the history of other nations. Hungarian administration has always been adaptive; in more lucky periods the model to be followed was chosen deliberately, whereas in unlucky periods we were forced to adopt a model, and we still cannot properly answer whether which was more profitable for us. Hungarian administration always followed a model, however it was never significantly left behind of that. Let us examine the beginning right away. As it is well-known, the foundation of the Hungarian state was the work of Géza and Saint Stephen. Hungary had two options: its Southern neighbor offered a highly elaborated model of administ-

ration which was the most regulated at that time, The Western neighbor, the Bavarian prince of the Frank empire which was just about to falling apart, suggested a model characteristic of early medieval times, where no real communal affairs existed, only private matters of the king. The difference between the two models was five hundred years: Byzance was so much more developed. It could not be doubtful, that our ancestors who looked with shiver at the hierarchic administrational structure of Constantinopol, the elaborated system of registration and control, the regularity and consistency of punishments and the lengthiness of the code put together by Justinianus, the content of which was completely impossible for them to comprehend, chose the Franco-Bavarian model instead, which was stemming from the 10th century and had just got rid of the administrational basis. Thus they chose a European model which was very under-developed, and therefore it could be successfully adapted and it was applicable in the Hungarian society just leaving the system based on ties of blood and customary law of nationalities.[9] The main point was, however, that we became assimilated to the West instead of the East, for by that time the society in Byzance was already full of oriental and despotic elements, too, and thus it was a lucky choice, even if the heads of the Árpád dynasty were not quite convinced of that, not even centuries later.

The second choice between models took place after the year 1526. The Turkish model was implemented on the occupied territories of the Hungarian Lowlands, the Austro-German model of the Habsburg Empire that had just gained the form of a well-organized empire was compulsorily introduced on the Northern territories of the country. The Austrian model declared the requirements of strong centralized power, that is centralization and a body of professional officials, the Turkish model allowed much more decentralization and self-government. The impacts of the Turkish model have not been fully analyzed yet, but it is an informative sign that as a result of the one-and-a half centuries long Turkish occupation 800 Ottoman-Turkish words remained in the Hungarian language and a great part of them is in connection with public administration and its functions[10] (interpreter, brigand, marauder, field-guard, shackle).

After all, the attempts to coerce Hungarians to adapt the Habsburg model lasted for almost four hundred years, unfortunately enough, only with partial success. Public administration, as I indicated in the section dealing with universal history, public administration in Europe only started to reach the level of the Roman empire in the 16th–18th centuries. That means, we could have joined the leading trends at the best time. But the events of Hungarian history starting from the insurrections in the 17th and 18th centuries, through the freedom fight lead by Rákóczi, the reformist movements at the beginning of the 19th century, the events of 1848, the homogeneous hatred towards to so-called Bach-hussars lead to the conclusion that Hungarian society did not praise the attempts to modernize administration in the efforts of the Habsburgs to annex Hungary.

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9 HÓMAN, B. and SZEKFŰ, Gy.: *Hungarian History*, Volume I, Budapest, 1935. Királyi Magyar Egyetemi Nyomda, 228 ff.

10 The History of Hungary, 1526–1686, Volume I, Budapest, 1985. 473.

Although numerous modernizing attempts originating from France could be reported, that would have reached Hungary (which came, by the end of the 17th century, fully under Habsburg domination), through Prussia and Austria, had they not been halted by the resistance of noble counties. Still, there was one area left, and two other accessories were attached to it, that could be regarded basically as the results of the Austrian empire, that were modern and effective and thus after the compromise of 1867 it could serve as basis for winding up the totally anachronistic centers of noble resistance, for modernization of public administration and, after 1920, the undisturbed functioning of the fully independent Hungarian state. This field is financial management. The constitutional government took over financial administration from the absolutist regime in an unchanged form it did not change the system of accounting, and cash services, and also the system of administration.[11] That may be where the still existing difference between money management and all other branches of Hungarian public administration comes from. Let me mention only for the sake of interest that in the capital during the battle—apart from the troops collecting and executing people—financial directories were the only functioning institutions, they continuously mailed the orders to pay taxes.

After World War II—since public administration goes on its own way—no real exchange of models occurred. Naturally, everything changed entirely at the level of words, slogans, ideology and aims: instead of government the council of ministers was set up, local governments were transformed into councils, mayors became presidents of councils, public administration became state administration, secretary of state became vice-minister, but the principle of competence that at the beginning had been implemented only in the field of financial management and later it was extended to every branch of administration was not hurt, and the hierarchic and centralized system of administration was not destroyed. The stated aim of the socialist period was to create an executive power resting on the principles of effectiveness and sufficiency, consented planning and cooperation that works in a predictable and uniform manner implementing large-scale measures, provides with social security and complies without delay with the instructions of the highest power which was, in the case concerned, a political party. It should have been an executive power Frederick the Greatest, Bismarck, Taylor, and Fayol dreamed about to create, but sparing the requirements of democracy and legality as obstacles to sufficiency, speediness, the effectiveness of the instructions of the highest power. It is the peculiarity of this period that the reason why the external model could not be adapted in Hungarian society was not that it possessed higher cultural values, nor because of the hidden intention to dominate but it was caused by its lower—or allegedly lower—level of development.

In 1989/1990 legality was reestablished in Hungarian public administration that again had to choose between several models. For the first time since Saint Stephen we could freely determine which waistcoat we put on. Owing to the researchers studying this subject the variety was well-known, and thus with the active help of the politicians

11 MAGYARI, Z.: *Hungarian Public management*, Budapest, Egyetemi Nyomda, 1942.

a system of public administration was set up integrated to the new democratic system that combines the outcomes of the American, French, Italian, German and Austrian development completed with the best Hungarian traditions. It is too early to speak about the real values of this, nevertheless the characteristics can probably be summarized.

First of all it has to be mentioned that the requirements of effectiveness and speediness can hardly be found in the arguments supporting the setting up of any presently existing institutions of public administration. There are many examples for the opposite. The Act on Local Governments expressly and on purpose omitted every consideration regarding reasonable management. The following words: decentralization. rule-of-law state, independence almost gained a mystical significance. Under this spirit were Hungarian local governments accorded autonomy to the extent no other municipality possesses in the world, and it is another consequence that the honorarium of local representatives is so high that in smaller places it takes half of the state subsidy given to the village. In the name of legal fundamentalism the Constitutional Court arrived at a decision that superciliously annulled the possibility to weigh the extra expenditures of the executive in value of more billion HUF. The Parliament enacted an Act on the Legal Status of Public Employees and Public Officials so that the minister of finances only took cognizance of the part concerning tens of billions half a year before its coming into force. Decisions of administrative authorities will be supervised within the framework of such a judicial system that could not be longer and more expensive, and there are many other examples.

Ten years ago, researchers of management-science had to work for improving the legality of Hungarian public management, for the reasonable narrowing of the scope of its activity, and now they worriedly experience that the interpretation of legality originating from the last century that has become the scale of functioning of modern public administration completely incapacitates it and makes it unable to fulfil the functions of providing services. The criteria of legality and expediency shall form a balance in the functioning of modern public management; the history of public administration so far has provided many examples demonstrating the dysfunction that were caused by disregarding any of the above criteria.

It is not only disregarding expediency that weakens our public management. It is also the dilemma that follows from the difference between the American-type, rather business-orientated interpretation of public administration wishing to make use of the rules of business and the other view that is rooted in Western-European traditions of public law and political science and still wants to protect the particular values and integrity of public administration. The dilemma comes from the necessity to choose among them.

According to management- and administration-theories, management or administration rests on the same principles regardless whether it concerns a state or industrial works. As it has been and in a few more sentences it will be further demonstrated, political sciences and sociology has disproved the above statement, but it has again gained support recently, as a possible way to solve the economic and social crisis. If there is no difference between public and private management, and private management

is more flexible and more cost-sensitive, why not shift the tasks of public administration over to private companies, or at least, as a minimum, why could state administration not carry out its functions implementing the methods of private companies? The new public management movement is especially popular in Great-Britain, New-Zealand and Australia. The movement promotes an economic program: rationalization within the organization, privatization towards outside. Internal rationalization follows the principles laid down by Taylor, many call the movement new taylorism, since the basic elements of the concept are as it follows: measurement of productivity, standardization of the stages of the working process, discovering the sources of losses, employee-transfer and cutting down, competition among the individual units of organization. Administration shall be financed not exclusively from the budget, but it shall find other sources, if necessary it shall collect stamp-duty, it shall make profit and shall not take more obligations, in a word, it shall become an enterprising state serving delighted clients. It is a great plan that the Congress approved in the United States upon the proposal of the vice-president with tremendous enthusiasm. They never started to realize the plan though, because in the meantime things have changed in the Congress. Still, in Hungary the plan is presented as if it was already realized.

The theory of organizational management that is rich in concepts and urges the change of paradigms forced many unsuccessful attempts in the field of financial management and aiming at the improvement of productivity, nevertheless many think, taking into consideration the high level of enthusiasm that it receives orders from politicians and state officials in high positions, since the orders are suitable for showing-off, they can serve for winning the sympathy of entrepreneurs with its all consequences. The rhetorics of "new management" belongs to the market and competition, and anybody turning against it might end up with a label: "incapable bureaucrat, incapable resistance fighter".

Western-European doctrine—especially the German, French, Italian and Spanish—emphasizes its serious doubts regarding "new" management, and it sets against it the classical principles of administration: the principle of hierarchy and that it is restricted by the rules of law. The principle of expulsion generally accepted in economy is absolutely unacceptable in state administration; the services provided by state administration cannot be made conditional upon payment of counter-value. That means, consumption by one individual cannot deprive others from the same possibility. While distribution of private goods is regulated by the market, the decision concerning production of public goods is the result of a political-administrative process. Entrepreneurial management operates with services connected with production of solely material goods, public good as a general aim does not motivate it. Scarcity of resources in public administration cannot be eliminated with business measures, say many experts. Its own internal system has to be developed instead, the budget system, state accounting, the controlling measures over the expenditures. I would like to quote Klaus Köning, the dean of Speyer word for word: "We have to get rid of the rhetoric of the entrepreneurial spirit, entrepreneurial culture, entrepreneurial management ... There are common features (in public and private administration, L. L.) but there are no generally applicable receipts.

Historic starting points and the cultural environment are too much different for that, especially considering the differences between the civic-culture administration of the United States of America and the classic administration of Europe."[12]

In relation to public management in Hungary, beginning from the end of the eighties the first task was to abolish the democratic deficit of administration, and in connection with that public management was reconsidered from the aspect of constitutional law, which effected strong administrative courts, a detailed legal regulation and depoliticization of the body of officials. The second phase is just about beginning: determination of the economic-effectiveness strategy, through settling matters of detail, such as the transfer of responsibility for decisions of social problems from the zone of state activity to the sphere of private activity, the extent and timing of this transfer. The process started in the most important field, in privatization of possessions, but in the field of privatizing tasks, contracting out, deregulation, elimination of subventions, cutting off only the first steps have been taken. Exactly as the one-sided law-orientated view may constitute an obstacle for the balanced functioning of public administration, the business-orientated view that considers the adaptation of entrepreneurial methods as the only admissible way to improve the effectiveness of public administration, may hinder the promotion of really effective methods. The spirit of competition creates advantageous environment for the operation of the strong, but it throws the weak on the mercy of entrepreneurial management that implements cruel measures and different behavior in order to gain profit. Public management providing social services, on the other hand, implements the principle of equal treatment and the rule of positive discrimination for those who are down and out. It means that instead of expulsion and victory this type of public management implements the traditional criteria of social justice, reasonable treatment and legality, all formulated long ago in Europe.

I only mention briefly the *different nature of moral norms* applicable in the entrepreneurial sphere and in public administration, and the conflicts originating from this difference. The moral norms of public figures and officials are much stricter and much more bound and closed than morals in private management. There are considerably less prohibitions limiting the actions and procedures of entrepreneurial management. In accordance with the formal rules of business life, the latter may give presents to each other, they may modify the conditions with mutual consent, may cancel deadlines, swallow up their competitors, etc. In public administration, already a promise for gifts counts as bribery, the conditions are binding for the administration, as well—by force of law—and the obligation of cooperation expressly prohibits the execution of any decision that might endanger the living conditions of the client. In the past few years quite a few successful businessmen got into high and the highest and positions in the administration in many countries from the United States to France, Italy, Austria and Hungary, with the aim of demonstrating the applicability of the new, more successful philosophy and

12 KÖNIG, K.: "Neue" Verwaltung oder Verwaltungsmodernisierung, Verwaltungspolitik in den 90er Jahren, Die Öffentliche Verwaltung, 1995, No 9, 356.

ethics in public management. From the viewpoint of the present paper it is less interesting that they failed to reach this aim, and it is more important that the moral values and ethics represented by them proved to be everywhere intolerable for the politicians as well as for the population, the society. The reason for their rapid retirement from the government was that their ethics attained in entrepreneurial management proved inadmissible in public life, rather than the lack of success, although that was also the case sometimes.

3. Beside the question of necessity of legal regulation, notwithstanding that over-regulation is unnecessary, the fact that the applicability of economical methods in public administration has come into the forefront, beside the critical evaluation of the aggressive organizational management that is directed at other aims, the third element to study is, which also forms a border area between necessary and unnecessary things, how to constitute proper relationship between public management and politics.

Politics, political parties see clearly the social significance of public management. They know that the state is to the most part consisted of administration, and that every political aim can only be realized with the help of administration. It can also be pointed out that the real aim of every political fight is to get the executive power. It has been proved, though, that if politics gain too much power over public administration then it will either result in the vanishing of state administration, or in the bureaucratization of politics. Therefore as a result of common efforts, a borderline was set up, one side of which is accorded to the empire politics without any conditions, but on the other side the technical, internal rules of public administration are in force. Of course, the line is being pushed towards one of the two territories depending upon the time and the nature of the relevant political system. But in every system and at every time commonly and exclusively applies that leading positions are distributed on the basis of political loyalty or service. It seems so that this is an expression of modesty and reservedness of politics, but considering that the person or group of persons on top of the hierarchy has influence over the entire administration, than the significance of this solution can be more realistically judged.

This hidden greediness, because that is what the above mentioned modesty should be called, constitutes at the same time the sole guarantee for integrity of public administration. Politics prevent that the dangers envisioned by several generations of sociologists from Marx and Max Weber become grave: the danger of bureaucracy becoming l'art pour l'art, the impossibility to cease the growing of power, the birth of an enstrangered caste of bureaucrats. Politics, while intending to retain its supremacy, keeps a tight hand on public management and thus it prevents the administration from setting its own aims, and it also prevents that any social organization other than public administration exercises public functions. Bearing in mind the untamable greediness of private administration, one can be happy to know that there is a power in society, politics, that even if only for the sake of its own interests, precludes the extension of another danger, that is, the danger that state organs start to function in order to reach private aims.

4. About the *future of public management,* about the rest of its history only so much could be said that the basis of its existence, the need for settling public affairs keep on strengthening. Communal functions, the dangerous growth of population, further improvement of the internal complexity of production process, creation of international administration above the national framework that is in accordance with the urges of globalization, continuing urbanization require that public management be strengthened, and the quality of its work improved. The desire for a small state is an illusion, since it would result in, although it would have certain advantages too, social anarchy. Only a public administration fulfilling strong organizational and serving functions, subjected to strict social control, and in active cooperation with self-governing civil organizations can solve the problems faced by the states, federations of states and mankind in the close and far future.

The other question is, whether to what extent public administration will differ from the one presently existing. This question has been discussed at numerous international conferences, but the answer was almost the same each time: it will be better, that is more accurate, more speedy, more understanding, more ready for cooperation, it will count much more on the contribution of citizens, etc. This aim will be reached through that its structure will be more clear, the internal division of labor will be more rational, the officials will be better trained. If one goes into details in interpreting prophecies, one recognizes that this is in accordance with the statement at beginning of the present paper, that I tried to prove in the course of the whole writing, namely that public management remains basically the same also in the future. This statement can be proved also with the lack of success of the planned reforms aiming to establish a matrix organization instead of the hierarchic structure of public administration and trying to fulfil public functions with nonprofessional members of civil organizations instead of capable and well-trained officials. The history of public administration seems to prove the view represented mainly by zoologists, ecologists, cultural anthropologists that change is not the sole guarantee of survival; sometimes it can be stability, as well.

However, it would sound exaggerated to claim that there will be no significant differences between the presently existing system of public administration and those existed in past historic periods. The electronic information systems implemented in public management, the so-called electronic files stored in computers make the work quicker and more accurate than it used to be, when at the beginning work was done on silk ribbons, papyrus-rolls, clay-boards, later on they used sheets of paper with quill, then with ball-point pen, then with typewriter. Documents used to be stored in dark, musty rooms where it was extremely hard to find them if needed. Discussions connected with the rare research of future conducted in this field have not yet discovered whether the progress of the technical background ever results in any improvement in quality. It is a fact though, that the new era of administration predicted around the turn of the century has not arrived yet. The completely different system of public administration characteristic of postindustrial society that was about to develop between the world wars did not present itself, either. Thus it is probably reasonable to claim that it is really hard to imagine, that instead of the four or five thousands of years old institution of human

culture that had evolved in an organic manner and then for a short period it was organized consciously, a completely different system of managing communal affairs could be established.

Public management is the same everywhere it has evolved since ancient times, and it is not likely to change in the future, either. Differences are rooted in the different points of view applied in several writings on public management, in the differing judgments of communal and individual values. Virtual processes indicate that where common interests prevail—regardless whether because of economic needs or for any other reason—strong public management evolves (see Egypt, China, later the states of enlightened absolutism). In societies preferring individual values either no public management was created (states of early feudalism), or only in imperfect form (Greek city-states, America in the 17th–19th centuries). By today, world has become uniform in this aspect: despite of all wishes, demands and conscious actions formulated and supported by literary, political, intellectual and entrepreneurial interest groups and international criminal gangs, exactly because of globalization of the world and because of the growing complexity of social problems, *in reality* the role of public administration, that is the administration in the interest of the public keeps on growing continuously.

Hungary follows the general line of development also in this aspect. This is a positive phenomenon that shall not be judged differently, with regard to the blustering of the above mentioned groups, lead by selfish motives.

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Constitution and Criminal Law

In its decision on capital punishment the Constitutional Court has made the following points:

The Constitutional Court should continue its work of interpretation in order to predicate the conceptual bases of the Constitution and of the rights embodied in it and to frame a coherent system of its judgements intended to serve as a sure measure of constitutionality, as an "invisible constitution" standing above the Constitution still often amended out of daily political interests, and therefore expected not to come into conflict with the new Constitution or any other constitutions to be adopted in future. In this procedure the Court will have freedom of action as long as it remains within the bounds of the notion of constitutionality.

Under this concept, the decision of the Constitutional Court is deliberately subjective and is historically determined; even if the Court declares absolute values, it lays bare the meanings they convey for its own era, and its judgements on question of, e.g., capital punishment or abortion have no claim to eternal value even in principle.[1]

In the course of preparing the new Constitution it is inevitable to take into account the decisions of the Constitutional Court, because they bring strong influence to bear on the exercise of the State's criminal jurisdiction despite the fact that the questions considered by the Court are not covered, or are treated inconsistently, by the text of Hungary's Constitution. On the other hand, it is a requirement for questions of criminal law to be governed by express provisions of the new Constitution, to be addressed not only by the invisible constitution. I believe that this desideratum is not in conflict with rule of law.

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1 Decision No. 23/1990. (X. 31.) of the Constitutional Court, 2180.

In this study I shall discuss two aspects of the relationship between constitution and criminal law. One concerns the relationship between international crimes and domestic law, while the other relates to the question of how the fundamental rights as set forth in the Constitution are protected and restricted by criminal law. I shall not address the provisions of the current Constitution on the right of asylum, as in their present wording they amount to a political declaration stating a legal absurdity. According to the current text, a person once granted asylum may never be extradited to anyone. The need for modification is obvious, but its modality calls for detailed analysis in connection with refugees.[2]

I. International Crimes and Domestic Criminal Law

1. That the courts apply the domestic criminal law was a doctrine treated as an axiom for centuries.[3] Acting in international criminal cases, too, the courts applied the rules of internal criminal law (in judging piracy, for instance). Similarly treated as an axiom was the principle that international law governed relations of States *inter se* and with international organizations and that the individual was not a subject of international law. With the recognition by international law of the category of human rights and especially with the admissibility of individual action against violations of such rights, this proposition treated as an axiom is being challenged in several aspects. If the individual can have rights in international law, it is no longer an absurdity to trace criminal responsibility to international law.

In another study of mine I have enlarged upon the arguments for distinguishing two categories of international crimes.[4] The conclusion drawn in the summary was based on internal law in connection with one category of international crimes and was directly grounded in international law in connection with the other category thereof. Criminal responsibility for the latter crimes may be established by either an international or a domestic court. In view of Art. 57 of the Constitution in force, the question arises of how the legal material relating to international crimes can be fitted into the internal law. For this question to be answered it is necessary to review the positions about the sources of international law.

2. For centuries, custom and treaty were the sources of international law. Treaties rested on the consensus of subjects at international law, with the common will expressed by the internal law of each contracting party. The operation of treaties was ensured by the principle of *pacta sunt servanda*. The international law were once traced to natural

2 Cf. WIENER, I. A.: *Nemzetközi bűnügyi jogsegély* (International Assistance in Criminal Matters), KJK–MTA ÁJI, Budapest, 1993, 25 et seq.; TÓTH, J.: *Menedékjog – kérdőjelekkel* (Right of Asylum, with Question-Marks), KJK, Budapest, 1994.

3 WIENER: *Op. cit.*, 130 et seq.

4 WIENER, I. A.: Büntető joghatóság és nemzetközi jog (Criminal Jurisdiction and International Law), *Állam- és Jogtudomány*, XXXIII/3-4, 165 et seq.

law, but that concept was later replaced by the positivist approach; this was decisively influenced by the concordant will of States, which in turn was viewed in the context of international legal. Additional categories are found in the viewpoint making a distinction between constitutional principles, customs and conventions, which are typical sources of law, with the general principles of law constituting a supplementary source of law.[5]

Accordingly the constitutional principles of international law form part of the international legal order, which is independent of the different subjects' own systems of law. The constitutional principles include the equality of sovereign States, the right to self-defence and such other basic principles as prevail without regard to the will of States.

Customary international law is made up of two elements. One is actual practice and the other is the opinion *(opinio juris)* that this practice is legally necessary, giving normative force to customs. Customs is a source of law which binds any new subject of international law as well, with its operation requiring neither express declaration nor observance by every member of the international community. The practice of States has no limitation as to time, and even lack of response on their part means acceptance, whereas their objection is of relevance only when motivated by momentous interests.

The practice of international courts plays an important role in moulding the shape of customary law, and their decisions are often accepted more widely than is the practice not supported by such decisions. The existence of customary law is not a matter of procedural law, so it is not subject to proof, but appears as part of the decisions given. The source of customary law is practice rather than *pactum tacitum*, as was professed by the socialist theory. Again, it is not a point at issue that the norms of customary law *per definitionem* may be strengthened by the content of treaties.

The view is also held that treaties take precedence over customary law, with the exception of *jus cogens* rules, in the relationship of parties.[6] Bernhardt maintains that the general principles of law are secondary to customary law, but this statement does not mean, even in his view, that the sources of international law are subject to a strict hierarchical order. He admits that numerous issues are in dispute and that the traditional views he sets out do not always conform with new opinions, but he does not consider the new categories to be generally accepted. Such a new category is what he calls soft law and conceives to be the forerunner of customary law. He classifies in this category the resolutions of different international organizations.

In the Supplement for 1991 Bernhardt refers to the 27 June 1986 judgement of the International Court of Justice, in which the Court classes the decisions of international organizations among the sources of law and considers that its jurisdiction exists under customary law even if ruled out by treaty law.

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5 MONACO, R.: *Sources of International Law* (in: Encyclopedia of Public International Law, Vol. I, North-Holland, Amsterdam–London–New York–Tokyo, 1992, henceforth EPIL), 424-434.

6 BERNHARDT, R.: *Customary International Law* (in: EPIL), 61–66.

Art. 38 of the Statute of the International Court of Justice recognizes the general principles of law of civilized nations as constituting a source of law. These general principles may be stronger than the rules of treaty law or customary law because they formulate norms binding on all.[7] By contrast, in Monaco's classification referred to above, the general principles of law are but a subsidiary source of law and serve to fill gaps in law. He considers that the non-retroactivity of legislation, the right of injured persons to damages, the prohibition of unjust enrichment, the guarantees of procedural law and responsibility for crime under criminal law are such general principles.

Among the general principles Mosler distinguishes the principles of the logic of law, such as *lex specialis derogat legi generalis, lex posterior derogat legi priori, nemo plus juris transferre potest quam ipse habet,* which are generally accepted rules of interpretation. He holds that the boundary between the rules of customary law and the general principles cannot always be drawn clearly and that bilateral and multilateral treaties are not superior, in the hierarchy of the sources of law, to customary law or the general principles. Prominent in the hierarchy of the sources of law are the rules of *jus cogens,* which, however, are present both in the general principles and in customary law. In 1951 the International Court of Justice pointed out, without mentioning the notion of *jus cogens,* that the principles set forth in the Convention on the Prevention and Punishment of the Crime of Genocide are binding on States even in the absence of a commitment undertaken in the Convention to that effect.[8] Although the practice of the International Court of Justice is not deemed to constitute a source of law because its decisions do not bind but the parties involved in a case, such judgements play an important role in the formation of customary law. Hence the source of law is constituted, not by the judgements themselves, but by the customary law as enforced in the judgements.

The term general principles of law is used in various senses and is less susceptible of clear definition than a treaty or customary law as a source of law. These general principles may derive from both internal and international law. More recently they have tended to appear also in resolutions of international organizations, particularly in those of the United Nations General Assembly. Therefore, as regards the sources of law, a further problem is posed by the normative function of international organizations. Every international organization has its own system of law, and such systems do not generally form part of international law. The lawmaking power of international organizations is exercised within the organizations and their rules are binding for members. In more recent times, however, a growing role has been played by the rule-making function of the United Nations, which is yet to be assessed by international law. Also, still to be clarified is the relevance of different declarations (such as those on human rights, colonialism, environmental protection) to the sources of law.

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7 MOSLER, H.: *General Principles of Law* (in: Encyclopedia of Public International Law, Vol. I.), *op. cit.* 89–105.

8 MOSLER: *ibid.*, 96.

3. The *jus cogens* rule has been a disputed problem of our time since the adoption of the Vienna Convention on the Law of Treaties. The force of *jus cogens* is equivalent to that of constitutional principles, and occasionally the term fundamental rule is also used in connection with them. Art. 53 of the Vienna Convention on the Law of Treaties provides that a treaty is invalid from the moment of its conclusion if conflicts with the mandatory rules of general international law. This provision means the recognition of *jus cogens*. The position that the will of States was the most important and that the rules of customary international law might be annulled by that will was prevalent in international law in the first part of the 20th century. Earlier, known in literature on international law had been *jus strictum* and *jus humanum* as categories which had also governed the treaty-making practice. According to Heffter, treaties that are contrary to the moral order of the world and, in particular, to the mission of States to contribute to the development of human freedom are null and void.[9] After World War Two the international community has realized the need for any legal order to be based on fundamental values which cannot be subjects of dispute within legal systems. In the practice of international courts this idea was expressed in the concept of *erga omnes* obligations. National courts have similarly recognized the existence of *jus cogens*. Thus, for instance, the Constitutional Court of Germany and the courts of the United States likewise invoke the *jus cogens* rules recognized by international law.[10]

The norms that may be regarded as *jus cogens* rules of international law apply to cooperation between States, but the fundamental norms of international criminal law (e.g. the rules prohibitive of the slave trade, piracy and genocide) are also considered as such. These prohibitions are extended by the practice of international courts to racial discrimination. In Frowein's view, the rules on the criminal responsibility of the State are also *jus cogens*.[11]

4. The sources of international law regarding international crimes can be of basically two types. One is international treaty, in which a State undertakes to punish a certain course of conduct, and the other is customary international law (which may also be called the basic or general principle of international law), which deems it necessary for certain activities to be prosecuted under criminal law. The customary law relative to piracy, the slave trade and war crimes was traditionally one of this type.

According to Schwarzenberger, the law applied by the Tribunal in the Nuremberg Trial was customary international law with respect war crimes and was a new treaty law with respect to crimes against peace and humanity.[12]

The Statute of the International Tribunal set up pursuant to a decision of the Security Council sums up in four articles the crimes within the Tribunal's jurisdiction:

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9 HEFFTER, A. W.: *Droit international public de l'Europe* (1883), 192.

10 FROWEIN, J. A.: *Jus cogens* (in: Encyclopedia of Public International Law, Vol. I.), *op. cit.*, 327–330.

11 YILC 1980 II, 232.

12 SCHWARZENBERGER, G.: *The Problem of International Criminal Law* (in: Current Legal Problems, 1950), 291.

Art. 2 enumerates grave violations of the Geneva Convention of 1949 committed against persons and property protected by the relevant articles of the Convention;

Art. 3 instances violations of the usages or laws of war;

Art. 4 qualifies as genocide acts committed against a national, ethnic, racial or religious group with the purpose of exterminating such a group wholly or in part;

Art. 5 qualifies as crimes against humanity certain acts committed against the civilian population in an international or internal armed conflict.[13]

While the decision of the Security Council may impose obligations on the Tribunal thus established as well as on States, it may not violate the principle of *nullum crimen sine lege*. Therefore, from the point of view of individual responsibility, the decision of the Security Council represents no new law, but the compilation of conducts are punishable on the basis of customary international law.[14]

The International Law Commission of the United Nations has for decades been dealing with preparations for the establishment of an International Criminal Court. In Part III the 1994 draft Statute of the Court covers the crimes within the Court's jurisdiction. As is stated in its Preamble, the example of genocide is indicative of the difficulty encountered in distinguishing crimes as covered by international treaty and by general international law. Notably genocide is defined by the Geneva Convention of 1948, but it is nonetheless beyond question that genocide is a crime under international law. The Court's inherent jurisdiction extends to judging crimes under international law as enumerated in Art. 20, namely

a) genocide,
b) aggression,
c) grave violations of laws and customs relative to armed conflicts,
d) crimes against humanity.

It is stated in the Preamble that the distinction made in paras. a) to d) is of particular relevance to the principle of *nullum crimen sine lege*. Although the Draft does not use the general category of crime under international law, the emphasis on the four crimes does not also mean a general denial of the category, it recognizes that the Draft Code of Crimes against the Peace and Security of Mankind undoubtedly contains several such crimes. According to the Preamble, the Commission, referring to the wording of para. a) of Art. 20, shares the widely accepted view that there exists a category of war crimes accepted in customary international law. That category is not identical with the definition given by the Geneva Convention. The modern view refers to rules applicable in armed conflicts rather than to the laws of war, and it uses the term "serious violation" in order to avoid confusion caused by the use of "grave breaches".

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13 Security Council Decision No. 827 (1993).

14 A similar problem is addressed by MOHÁCSI, P.: *"Compilation and Human Rights"* (in: Finnish-Hungarian-Estonian criminal law seminar on The New Aspects of the Rule of Law, September 7–9, 1993, Helsinki).

Para e) of Art. 20 refers to crimes enumerated in the Annex and, in the given case, qualifying as particularly grave crimes from the international point of view.[15]

Also, Art. 39 headed *"nullum crimen sine lege"* distinguishes two categories of international crimes. Accused persons may only be declared guilty if, at the time of its commission, the act (action or omission)

a) was deemed to be a crime under international law in the cases covered by paras. a) to d) of Art. 20;

b) came within the ambit of the relevant treaty in the case covered by para. e) of Art. 20.

As regards para. e) of Art. 20, it is not enough that accused persons violated the provisions of the relevant treaty, but the applicability of the treaty as a law to their act should also be examined. Thus, for instance, if a citizen of State A committed an act violative of a treaty in the territory of that State, but State A was not a party to the treaty, the treaty formed no part of the law of that State. If, however, that citizen committed the act violative of the treaty in the territory of a State which was a party to the treaty, the invalidity of the treaty in the territory of the State of which he is a citizen is irrelevant.

5. The independence of internal law of crimes under international law is recognized by the decision of the Constitutional Court along the following lines: Within its own system, international law requires that, at the time of their commission, crimes should, on the basis of the general principles recognized by the community of nations, be deemed to be war crimes or crimes against humanity in accordance with the rules called customary international law above. In the case of these crimes it is in fact the criminal jurisdiction of the international community that is exercised through the criminal jurisdiction of the Hungarian State subject to the conditions and guarantees determined by the community of nations. The national law is applicable to the extent expressly stated by international law (as is the case with, for instance, the scales of punishment). The national law cannot prevail over an express and *jus cogens* rule, different in content, of international law.

As can be seen, the question of whether the Geneva Conventions were promulgated as prescribed or whether the Hungarian State complied with its obligation to enforce them before the time-limit set for the Act's application, namely before 23 October 1956,

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15 The relevant articles are contained in the following Conventions as referred to in para. e) of Art. 20.
1) Grave violations of the Geneva Conventions;
2) Hague Convention of 16 December 1970 on Highjacking;
3) Montreal Convention of 23 September 1971 on Acts against the Security of Aviation;
4) Convention of 30 November 1973 on Apartheid;
5) Convention of 14 December 1973 on Internationally Protected Persons;
6) Convention of 17 December 1979 on the Taking of Hostages;
7) Convention of 10 December 1984 Prohibiting Torture;
8) Convention of 10 March 1988 on the Law of the Sea;
9) Convention of 20 December 1988 on Narcotic Drugs.

is of no relevance. The perpetrators' responsibility under international law existed regardless of this, and it may be given effect in its original scope by an eventual domestic enactment of a later date.

The rules relative to war crimes or crimes against humanity undoubtedly form part of customary international law, of the general principles recognized by the community of nations, or, in the language used by the Hungarian Constitution, of "the generally recognized rules of international law". According to the first sentence in Art. 7 (1) of the Constitution, these rules are "accepted" by Hungarian law, and they are consequently regarded as a part of the "obligations under international law" with no need for specific transformation or adaptation as their harmony with the internal law is similarly provided for by the second sentence of the paragraph cited above.[16]

States have developed two techniques for the application of international in internal law. One is transformation, by which international law is made a part of internal law through internal law norms adopted from time to time. The other dispenses with concrete acts of internal legislation. The preparation of a new Constitution is accompanied by a debate on which technique should be chosen by the Hungarian Constitution. The debate revolves about only one category of international crimes, namely those covered by international treaty. Once criminal responsibility based on international law has been accepted no internal legislation to give effect to the principles guarantee of criminal law but the operation of domestic jurisdiction requires a sovereign decision of the State because criminal procedure is a manifestation of state sovereignty.[17] The type of state act required for expression of state sovereignty is an internal matter of constitution-making. It may be decided on by Parliament as the highest repository of state sovereignty, by the Government as the organ responsible for domestic crime control or by the judicature as an independent branch of power. In Hungary this decision was made by Act XC of 1993 in regard to crimes committed in a certain period, and Art. 2 of that Act did no more than widen the scope within which the Geneva Conventions are constitutionally applicable, irrespective of future legislation, through the binding force of the Constitutional Court's decision.[18]

While interpretation of the Constitution is a function of the Constitutional Court, it is a right and a duty of Parliament with constitution-making powers to resolve contradictions between constitutional provisions. These powers cannot be exercised by the Constitutional Court.[19]

It would be necessary, therefore, to amend Art. 57 (4) of the current Constitution to spell out that no conduct other than that declared by Hungarian law to be a criminal offence may be regarded as criminal. Furthermore, some other article should also

16 Decision No. 53/1993. (X. 13.) of the Constitutional Court.

17 GRÜTZNER, H.: *International Judicial Assistance and Cooperation in Criminal Matters*, in: A Treatise on International Criminal Law (M. C. BASSIOUNI and V. P. NANDA, eds., 1973), Vol. II, 180.

18 Decision No., 53/1993. (X. 13.) of the Constitutional Court.

19 *Ibid.*, 2178.

determine the organ empowered to decide on the exercise of criminal jurisdiction in regard to crimes under international law. If that organ is the legislature and the form of decision is a law, the act of legislation will not, in this case, implement the principle of *nullum crimen sine lege*, but will merely resolve a problem affecting the sphere of authority at the state level.

It is hereby *proposed* that the phrase "under Hungarian law" should be omitted from the wording of Art. 57 (4), whereas the provision of the Criminal Code on its scope of application should be worded in accordance with the rules of the human rights conventions prohibitive of retroactivity and the rules of criminal procedure should include a provision empowering the Metropolitan Court to judge crimes of international law. By doing so the State would express its exercise of criminal jurisdiction over crimes under international law, while freeing their prosecution from the parliamentary effects of daily politics.

II. Constitutional Fundamental Rights and Criminal Law

1. The question arises, with respect to all of the constitutional fundamental rights, whether it is possible, and under what conditions, to restrict those rights and what criteria should be used for establishing priority in case of their collision.

Art. 8 of the Constitution states that "the Republic of Hungary shall recognize man's fundamental rights inviolable and inalienable, and it shall be a prime duty of the State to respect and protect those rights. The rules establishing fundamental rights and duties shall be laid down by law", but the essential content of fundamental rights must be subject to no restrictions.

The State may not resort to restricting a fundamental right except when protection or implementation of another fundamental right or freedom, or protection of another constitutional value cannot be secured by other means. So, for restriction of a fundamental right to be constitutional, it is not sufficient for restriction to be required by protection of another fundamental right or freedom, or in the interest of another constitutional goal, but restriction should meet the criteria of proportionality, namely the importance of the desired goal and the extent of prejudice caused to a fundamental right in pursuit of the former should be duly proportional. In imposing a restriction the legislator must use the softest means best suited to attain the given goal. Restricting the content of a right is unconstitutional if done without an imperative cause or in an arbitrary manner, or if the extent of restriction is disproportionate to the desired goal.[20]

The Hungarian Constitution uses the expression "fundamental rights" as the generic term of the rights referred to in the European Convention as human rights and freedoms.[21] Member States thus have a certain margin of appreciation concerning the

20 Decision No. 31/1992. (V. 26.) of the Constitutional Court, 1910.

21 BÁRD K.—BÁN, T.: Az Emberi Jogok Európai Egyezménye és a magyar jog (The European Convention on Human Rights and Hungarian Law), *Acta Humana*, 1992, No. 6–7, 9.

need to restrict them in a democratic state. The European Court of Human Rights controls the need for restriction by using the so-called necessity test.[22] Application of a criminal sanction necessarily means restriction of a fundamental right. The framework for protection by criminal law is therefore created as a result of deliberation. In using the necessity test it should be examined whether there is a need for restriction, namely for regulation by criminal law, whether restriction is proportional and appropriate to attaining the purposes of punishment. In this context, judgement is influenced by the existence or absence of social consensus in declaring an act to be a criminal offence, by the group of people affected by and opposed to criminal responsibility. On the international plane, it should be examined whether there is a generally held view in this respect and whether the related community interests are similarly protected at least in a similar cultural environment. It is necessary to examine the moral content of an act, which may differ from the average in respect of, say, professional negligence. It is necessary to consider the extent to which restriction is apt to achieve the purpose of punishment under criminal law (e.g. abortion, alcoholism, drug addiction). Finally, it is necessary to consider the *ultima ratio* nature of criminal law (whether other means are sufficient).[23]

2. While the Constitution in force does not expressly formulate the obligation to prosecute crime, several of its provisions refer to the obligation to protect values, even by exercising criminal jurisdiction:

— under Art. 35 (1) the Government must protect the constitutional order, protect and ensure the rights of citizens;

— under Art. 50 (1) the courts must protect and ensure the constitutional order as well as the rights and legitimate interests of citizens and must punish the perpetrators of criminal offences;

— under Art. 51 (1) the Chief Prosecutor and the Prosecutor's Office must be concerned to protect the rights of citizens and to consistently prosecute any acts violating or endangering the constitutional order and national security and independence.

These brief provisions of the current Constitution are counterbalanced by the invisible constitution's explanations about the sanction of criminal law. Accordingly the role and function of criminal law sanctions consist in upholding the integrity of legal and moral norms when the sanctions of other branches of law are insufficient:

— the punishment intended to protect the integrity of law has a symbolic function, notably the commands of criminal law must not be violated even if one has a cause to do so or if the punishment fails to achieve, or is unfit to achieve any particular purpose. The purpose of punishment is in itself, namely in the public declaration of the integrity of law, in relation regardless of purpose;

— the principle of proportional punishment is the only possible one in a constitutional state for the added reason that it alone is consistent with the idea of equality before the

22 BÁRD-BÁN: *ibid.*, 125–126.

23 KREMNITZER, M.: *Constitutional Principles and Criminal Law* (Israel Law Review, Volume 27, No. 1–2), 87 et seq.

law. Any other consideration would mean the declaration of inequality, for the individual would perform regard his personal status, rather than the act, as the yardstick for punishment—stated in a parallel opinion.[24]

In another parallel opinion, the criminal jurisdiction of the State undoubtedly restricts man's freedom of decision, thus operating as a limitation upon human dignity in a certain measure, while it allows scope for a new positive moral established norm may be freely accepted and observed and that such a decision has a moral value. It is nevertheless a fact that just as human freedom is both a limit to and a precondition for social existence, a State-protected norm is a limitation to a moral value and is therefore in place only where necessary, and to the extent required, for protecting the life and freedom of individuals (life being understood here as comprising all preconditions for social existence). Therefore according to this parallel opinion, that punishment is acceptable only in this goal-directed sense and loses justification as soon as it becomes unsuitable for achieving its purpose.

Since the criminal jurisdiction of the State is not uniformly interpreted even by the members of the Constitutional Court, this in itself or the limitations of jurisdiction do not lend themselves to deducing the admissibility or inadmissibility of capital punishment. For centuries it has been an implicitly accepted principle, a constitutional one, of criminal law that punishment has a preventive purpose serving to suppress attacks on protected social values. Punishment can only be effective where, and to the extent that, it is suited to its purpose, and it loses its legal basis when unable to serve that purpose or able to serve it at the price of a greater injury than the one it is meant to prevent.[25]

What has been stated in connection with the purpose of punishment, regardless of whether there is a consensus among the members of the Constitutional Court on this issue, can at most be considered as a scientific opinion seeking to assist the transition to a constitutional state, but I do not believe in the existence of a principle of punishment serving as the basis for "the only possible punishment in a constitutional state". There is a voluminous literature on the purposes of punishment, and the proportional or educational trends are changing by place and period.[26] Indeed, Art. 3 of the European Convention on Human Rights is concerned with the quality of punishment applied rather than with the purpose of punishment pursued, and it gives no positive wording of punishment, but merely prohibits acts of inhuman and degrading punishment. *Therefore I am of the view that formulation of the purposes of punishment is not a question for the Constitution to cover.*

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24 Decision No. 23/1990. (X. 31.) of the Constitutional Court, 2186.

25 Decision No. 23/1990. (X. 31.) of the Constitutional Court, 2187.

26 Interesting studies on this subject are contained in *Criminal Law Theory in Transition. Finnish and Comparative Perspectives* (edited by R. LAHTI–K. NUOTIO), Finnish Lawyers' Publishing Company, Helsinki, 1992.

3. In one of its decisions[27] the Constitutional Court uses the term constitutional criminal law, and the use of this term has also probably made for the failure to duly separate questions of constitutional and criminal law in analyzing the problems that have emerged. Yet it is necessary for both constitutional and criminal law to resolve problems of codification and interpretation of law by using terms of their respective systems. During the period of transition it may be acceptable that in the course of its work the Constitutional Court takes a broader view of interpreting the Constitution, and such interpretation may be of help in elaborating the concept of a new Constitution, but once the new Constitution has been adopted, it will be necessary to interpret that Constitution instead of the invisible one. Delimitation of problems affecting constitutional and criminal law assumes particular importance for the added reason that the Constitutional Court has recently handed down decisions addressing questions of criminal law not only from the standpoint of constitutional law.

In examining restriction by means of criminal law of the freedom of expression the Constitutional Court has maintained that constitutionality should be considered in conjunction with observance of the constitutional precepts relating to the entire system of criminal law. The source of those precepts is in the concept of constitutional criminal law and in the set of requirements deriving from a constitutional state as a fundamental value for the exercise by the State of criminal jurisdiction, including the limitations on substance and the formal requisites of criminal legislation. In this context the Decision referred to the International Covenant on Civil and Political Rights—adopted by the 21st Session of the United Nations General Assembly on 16 December 1966 and promulgated by Law-Decree No. 8 of 1976—, which embodies the freedom of thought [Art. 18 (1)] and the right to the freedom of expression [Art. 19 (2)]. It pointed out, furthermore, that exercise of the rights contained in the freedom of expression carries with it special duties and responsibilities. Hence it may be subject to certain limitations, but these must only be such as are provided by law and are necessary a) for respect of the rights or reputations of others or b) for the protection of national security or of public order, or of public health or morals. Again, the Decision quoted para. 2 of Art. 20, under which "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law". Then it referred to the International Convention on the Elimination of All Forms of Racial Discrimination, which carries a legal obligation for the Hungarian State and was promulgated by Law-Decree No. 1 of 1969; under Art. 4 of the Convention, States Parties must declare propagation of ideas based on racial superiority or hatred to be an offence punishable by law.

To sum up the position of the Constitutional Court, limitations on the freedom of expression and the freedom of the press are required and justified both by the historically proven harmful effect of hatred against specific group of people and by protection of constitutional fundamental values and fulfilment of the international

27 Decision No. 42/1993. (VI. 30.).

obligations of the Republic of Hungary.[28] Consequently the conduct penalized by Art. 269 (1) of the Criminal Code[29] threatens individual rights, too, which thus give such weight to the public peace as the direct object that restriction of the freedom of expression can be viewed as necessary and proportional.

The Constitutional Court held that in codifying Art. 269 (2) the Criminal Code had started from the fact that use of derogatory expressions with respect to national or religious communities was generally contrary to the desirable tranquillity of society. This definition of the immaterial facts of the offence thus protects public order, the public peace, social peace in themselves, in an abstract way. The crime is also deemed to be committed when the derogatory expression does not, under the circumstances, carry the danger of prejudice to individual rights. Such abstract threat to the public peace is an insufficient argument in favour of constitutionally restricting the freedom of expression by punishment under criminal law.

The Decision states that the right to the freedom of opinion protects opinion without regard to its content of value and truth, yet Art. 269 (2) places no external limitation, but actually qualifies on the basis of the value-content of opinion, to which disturbance of the public peace is only linked by assumption and statistical probability.

Maintenance of the public peace does not inevitably require the law to threaten with punishment under criminal law the use in the presence of others of insulting or derogatory expressions with respect to the Hungarian nation, a nationality, a people, a religious or a racial group (or the commission of other similar act). This statutory definition of the pertinent facts restricts the right to the freedom of expression unnecessarily and in a manner disproportionate to the desired goal. An abstract, eventual threat to the public peace gives insufficient cause for the Criminal Code to place limitations, as determined by Art. 269 (2), on the fundamental freedom of expression, which is indispensable for the functioning of a democratic, constitutional state.[30]

The Decision of the Constitutional Court has stated, furthermore, that "racial" incitement is prohibited by criminal law in all democratic countries of Europe with a continental system of law and, on the territories of Anglo-Saxon law, in England and Wales, Canada and New-Zealand. However, drawing the appropriate boundaries between incitement, hatred and the freedom of expression is a source of considerable debates in

28 Decision No. 30/1992. (V. 26.) of the Constitutional Court, 1912.

29 Art. 269. (1) Whoever in wide publicity incites to hatred against

a) the Hungarian nation or some nationality,

b) some nation, religion or race, furthermore certain groups of the population, commits a felony and is punishable with deprivation of liberty up to three years.

(2) Whoever in wide publicity uses an expressive offensive or degrading to the Hungarian nation or some nationality, nation, religion or race, or commits other such conducts, is punishable for a misdemeanour with deprivation of liberty up to one year, community service or fine. (This paragraph was abolished by the decision of the Constitutional Court [30/1992. (V. 26) AB határozat)].

30 Decision No. 30/1992. (V. 26.) of the Constitutional Court, 1913–1915.

the international arena as well.[31] For this reason, too, it is not certain that Art. 269 (2) will stand the necessity test. In point of fact, the Constitutional Court proceeds from the assumption that the right to the freedom of expression protects opinion without regard to its content of value and truth.

This statement—in my opinion—not only runs counter to the provisions of Covenant Art. 20 (2), but para. (1) thereof spells out that any propaganda for war must be prohibited by law. In my view, then, *the freedom of expression is not independent of value-content. Moreover freedom without a content of truth is open to doubt on the basis of the arguments advanced in the following decision of the Constitutional Court.*

4. Manifestation of opinion expressing a value-judgement apt to injure the honour of an authority or an official, or a politician acting in the public view in its/his capacity as such is not constitutionally punishable. Allegation or spreading of facts fit to impair honour or use of a term directly referring to such facts is punishable only if the person alleging or spreading facts fit to impair honour, or directly referring to such facts was aware that his allegation was untrue in content or was unaware of its untruth because, under the rules of his profession or occupation, he failed to show the diligence that could be expected of him with respect to the object, means and target of his allegation.[32]

According to the Decision, the constitutional boundaries of the freedom of expression should be established by taking into consideration, along with the subjective right of the person expressing opinion, the interest attached to the formation or free creation of public opinion and indispensable for democracy. The right to the freedom of expression is not only a fundamental subjective right, but also recognition of its objective, institutional aspect, while serving as a guarantee for public opinion as a fundamental political institution.

Although the distinguished role of the right to the freedom of expression does not imply that this right is unrestrictable, as are the rights to life and to human dignity, it certainly means that this freedom actually has to yield to very few rights, namely the laws placing limitations on the freedom of expression should be interpreted restrictively. A restrictive law, when considered against the freedom of opinion, carries a greater weight if it directly serves to ensure observance and protection of another fundamental subjective right; it has a smaller weight if it protects such a right only indirectly, through the medium of an "institution"; and its weight is smallest when it serves nothing but an abstract value in itself.

The right to the freedom of expression protects opinion without regard to its content of value and truth. It is subject to external limitations only. Unless it exceeds such external limits constitutionally imposed, it is the very possibility and fact of expressing opinion that is afforded protection without regard to its content. In other words, what enjoys constitutional protection is expression of individual opinion, public opinion shaped by its own laws and, in interaction with the former, the possibility of forming

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31 *Ibid.*, 1909.

32 Decision No. 36/1994. (VI. 24.) of the Constitutional Court, 2511.

individual opinion based on as wide a range of information as possible. The Constitution ensures free communication (individual conduct and the social process), and the fundamental right to the freedom of expression is unrelated to the content thereof. In this process there is a place for every opinion, good and harmful, pleasant and offensive alike, especially by reason of the fact that the qualification of opinion is itself a product of this process.

The criminal law means of protecting honour restrict the freedom of expression in defence of the constitutional values of the rights to human dignity and to reputation.

Under Art. 54 (1) of the Constitution, every human being has the inherent right to life and dignity. Since Decision No. 8/1990. (IV. 23.) [ABH 1990, 42] was handed down, the practice of the Constitutional Court has conceived of the right to human dignity as a "general personality right". The general personality right is a "parent right", i.e. a subsidiary fundamental right which both the Constitutional Court and the ordinary courts may always invoke in defence of the individual's autonomy if none of the qualified fundamental rights can be applied to the pertinent facts of a particular case.

This—in my view—*statement affects questions of detail explicitly of criminal law and is in conflict with the dogmatic system of the relevant part of criminal law.* The dogmatic system functions well only if free from contradictions.

5. In this Decision[33] the Constitutional Court touches on specifically criminal law issues which it will be impossible for it to take concern with not only under the current Constitution, but also under the "invisible" and, hopefully, the new Constitution now in the making.

As is stated in the Decision, the perpetrator's acts include alleging or spreading, in the presence of others, facts objectively apt to injure honour, or using terms directly referring to such facts (henceforth called "statement of facts"), or using terms or committing acts objectively apt to injure honour (henceforth called "value-judgement").

The act can only be committed with intent: commission through negligence is not punishable by law. For willful commission to be established it is necessary that the perpetrator be mindful that the statement of facts or the value-judgement is made in the presence of others, refers to an official or one representing an authority and is objectively apt to injure the honour of the official or, through insulting him, that of the authority. Guilt is not conditional on intent to insult, and the motive of the act can be judged, not in establishing guilt, but in meting out punishment.

In examining the constitutionality of regulation by criminal law it is of particular relevance that the untruth of facts apt to injure honour is not a pertinent element of the criminal offence, so statement of facts, whether true or untrue, is deemed to be a crime. Establishment of guilt does not require awareness of the untruth of facts, so error concerning the truth of facts is indifferent to criminal law. Likewise indifferent to the commission of the crime is the perpetrator's "good or bad faith", his diligence or

33 Decision No. 36/1994. (VI. 24.) of the Constitutional Court, 2511–2513.

negligence in ascertaining the truth of facts. The perpetrator is not relieved of criminal responsibility either by due foresight or by *"bona fide"* error.

Protection of the honour of officials is an aspect of the inalienable and unrestrictable right to human dignity. Among the fundamental rights relating to the person's social appreciation Art. 59 (1) of the Constitution mentions only the right to reputation, but there is no doubt that honour as emanating from the parent right to human dignity similarly enjoys the protection of a fundamental right under Art. 54. Although only an official representing an authority can have human dignity, an authority may also lay claim to a favourable value-judgement of or appreciation by society.

Its consideration, in their interrelationships, of the constitutional protection of human dignity, honour and reputation, of the right to the freedom of expression and of the constitutional interest attaching to the freedom to discuss public affairs has led the Constitutional Court to conclude that the freedom of expression may only be subject to a smaller degree of restriction in defence of the exercise of public power. For the protection of the honour of authorities and officials the means of criminal law that are strictest in the regime of responsibility may not be used constitutionally except in cases outside the sphere of the freedom of expression.

According to the Decision the Constitution makes no express distinction between statements of facts and value-judgements in spelling out the freedom of expression. The freedom of expression is basically aimed to enable individuals to shape the opinion of others, to convince others of their own position. Therefore it generally includes the freedom to communicate anything, regardless of the manner and value of communication, its moral quality and usually its content of truth. Statement of a fact may be itself qualified as opinion, for opinion may also be reflected by the circumstances of communication, that is, the constitutional fundamental right to express opinion is not limited to value-judgements. In drawing the boundaries of the freedom of expression, however, it is justified to make a distinction between value-judgements and statements of facts.

The freedom of expression always includes value-judgements, the personal opinion of individuals, irrespective of whether they are valuable or worthless, true or false, or are based on emotion or reason. Nevertheless, human dignity, honour and reputation, which are equally protected by the Constitution, may place external limitations on the freedom of expression as manifested in a value-judgement, and giving effect to criminal responsibility in the interest of protecting them cannot, on the whole, be regarded as disproportionate and hence unconstitutional.

Yet the Constitutional Court maintains that the Constitution accords increased protection to value-judgements voiced in conflicting views on public affairs, even if such views may be exaggerated and extravagant.

Again, protection of society's peace and democratic development does not need the intervention of criminal law against criticisms of or negative judgements on the activities of authorities and officials that are manifested in the form of insulting or defamatory statements or conduct. The view, set out in Constitutional Court Decision No. 30/1992. (V. 26.), that shaping public opinion and the political style

by criminal law penalties is a paternalist approach holds for this case as well (ABH 1992, 180).

What has gone before may be viewed and disputed in the way of appraisal based on the necessity test, but the points to be made below concern a problem of criminal dogmatics which, given the subjective aspects involved, is not a matter of constitutional law.

6. In the view of the Constitutional Court the freedom of expression does not include statements of untrue facts apt to injure honour if the person uttering a libel is positively mindful of the untruth or if, under the rules governing the exercise of his profession or occupation, he could have been expected to ascertain the truth of facts, but he failed to use diligence in his responsible exercise of the freedom of expression.

The Constitutional Court has held that the unconstitutionality of the criminal law is not ruled out by the possibility to prove the truth of statement.[34] Regulation by criminal law is based on the presumption of untruth. *My comment on this line of reasoning is that regulation by criminal law is based, not on the presumption of untruth, but on the objective, not subjective, criteria of aptness to injure honour.*

The Constitutional Court maintains that the admissibility of defence with the truth under the burden of proof not only means prohibition of deliberate utterances of falsehood, but is also apt to discourage persons from criticizing the activity of those exercising public power. The possibility to prove the truth does not counterbalance unnecessary and disproportionate limitations on the freedoms of expression and the press, does not substitute for constitutional protection in case of stating facts, either true or reasonably believed to be true, but apt to injure the honour of an official.

In case of proving the truth the general rule for evidence, following from the presumption of innocence, a constitutional basic principle of criminal law, turns round, that is, the burden of proof is borne by the person against whom proceedings are taken. The perpetrator's punishability is excluded by nothing but the proven truth. His guilt must be established if the proceeding authority has not satisfied itself that the fact stated is true in content. The consequences of the impossibility to prove the truth of facts are suffered by the person against whom criminal proceedings have been instituted, and the presumption of innocence does not prevail in this case.

The Decision has stated that, with respect to exercise of public power or to actors of public life, disclosure of true facts should always be deemed to be in the public interest even if such disclosure is apt to damage the social appreciation of those persons, and appraisal thereof cannot be left to the authority proceeding in criminal cases.[35]

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34 Proving the Truth

Art. 182 (1) The perpetrator can not be punished for the crimes defined in Arts. 179-181 (Libel and Slander, Defamation, Profanation of the Memory of the Deceased) if the fact fit to impair the honour proves to be true.

(2) Proving the truth is admissible where the assertion, spreading of facts or the usage of a term directly referring to such was motivated by public interest or by anyone's lawful interest.

35 Decision No. 36/1994. (VI. 24.) of the Constitutional Court, 2516–2518.

7. The statement made in the dissenting opinion about the question of constitutionality points out the following: the ordinary courts may, by relying on the present set of conditions for proving the truth, constitutionally decide whether a particular case involves the freedom of expression or an act offending the private sphere and dangerous to society. The content of "public interest" and "anyone's lawful interest" is evolved by the practice of ordinary courts; under it, the closer the sphere of civil relations affected by a statement of facts is to public life the wider is the protection of the public interest or of lawful private interests, on the basis of which the truth can be said, and the closer it is to private life the smaller is the possibility to prove the truth.

Moreover it is for the system of criminal law to regulate the objective and subjective elements of responsibility and for criminal procedure to judge individual cases. The unlawfulness of defamation (and insult) may be excluded on an objective basis if social appreciation attaches greater importance to the statement of fact or the expression of opinion than to the protection of the injured person's honour. The provisions of Art. 17 of Statute XLI of 1914 provided a statutory example of this.[36] In our days judicial practice has excluded the unlawfulness of defamation and insult in connection with numerous circumstances (e.g. expert or scientific opinion, giving evidence for authorities, fulfil educational duties).[37] In these cases the only limit to statements of facts or expressions of opinion is set by the punishment of the use defamatory terms, because use of such terms, insulting in themselves, is punishable in these cases as well.

If the Constitutional Court wishes to attach similar importance to public or political activities, it would have had to invite the legislator or the ordinary courts to regulate the causes excluding similar cases of unlawfulness, because the causes excluding unlawfulness come into play in the stage preceding the institution of criminal proceedings. Aptness to injure honour as well as the circumstances in which facts are stated or opinion is expressed can be objectively considered before the institution of proceedings, such consideration needing no hearing.

Failure to show diligence, or negligence as indicated in the Constitutional Court's Decision can only be examined within the framework of criminal proceedings. Since proceedings in such cases are usually instituted by private indictment, effective protection to the critic can only be accorded by a criminal law solution that does not allow criminal proceedings to be taken against the critic, for, as is commonly known, what in a case liable to prosecution by private indictment is important for the private prosecutor is not the punishment, usually minimal, meted out by the court, but the fact

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36 "(1) Establishment of defamation or insult shall be excluded if the statement of a fact or the use of a term directly referring to a fact occurred orally or in a document during the hearing of the case before the authority in relation to the case and the party thereto.

(2) This same rule shall apply to other similar declaration made by the party to the case or by his representative orally or in a document during the hearing of such a case, provided that the declaration is related to the case and was necessary in the interest of the party."

37 Cf. *A Büntető Törvénykönyv magyarázata* (Comments on the Criminal Code) KJK, Budapest, 1986, 532–533.

that the critic can be brought into a defendant's position. Since that position is by itself necessarily an injury to the personality right—which is conditional on the particular conduct being a criminal offence—, the rules of criminal law should be formulated in such a way as to prevent such injury as well. It is this objective situation for which a circumstance excluding unlawfulness can be created by applying the necessity test.

In my view *systematizing and operating the conditions for criminal responsibility in substantive and procedural law is not a matter of constitutional law. It would therefore be advisable to separate problems affecting constitutional law and the internal systems of other branches of law.* As such separation applies to both legislation and jurisdiction, it would seem reasonable to empower the Constitutional Court to examine the constitutionality of jurisdiction as well. Such practice might prevent an intermix of matters pertaining to constitutional and criminal law and ensure reversal of the proportion of majority/minority views in the decisions handed down by the Court. Given its lack of competence, the Constitutional Court may not examine the constitutionality of decisions taken by jurisdiction, but this is no sufficient cause for its annulling a law or regulation that may be applied harmony with or contrary to the Constitution.

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Imre TAKÁCS

Second Chamber of the Legislature

The assertion that the constitution's function transcends the boundary of regulating public power appears to be a commonplace in the literature on the subject. In a legal sense the constitution is a fundamental law, but in a sociological sense it is also a basic law which governs the order of society, has its roots in the past and forms part of the public mind and consciousness of national identity. The constitution's regulatory, organizational, protective and educational functions are not fulfilled by serving the present, but, by expressing the fundamental values of society, they also promise the new generations the predictability of the future. Rising to poetic heights, the authors on this field go so far as to spell out people's desire to see in the constitution a guarantee for the realization of their hopes.

We should not be deceived by the nationalism of our age and the international process of integration apparently working against national constitutions. Although the legal systems are "blended" by the harmonization of laws, a limit to such interference is set by the degree of necessity. In contrast to "Frederick the Great of Brussels", today's self-conscious miller of Sansouss may invoke the principle of subsidiarity before the court of Luxembourg.

Among the branches of law it is constitutional law that has the closest attachment to national traditions. Nothing is derogated from its value if, while being capable of changing in substance, it preserves public-law "relics" of the past, even though such relics are often confined to maintaining certain forms of organization or certain designations of merely symbolic significance. Every society moulds the shape of its constitutional institutions on the basic of its own internal development, under the guidance of politics, but by forming a consensus of opinion with the help of cultural

and spiritual factors that are at work in society, yet seeking to learn and to rely on the experience of the other countries, while striving for progress and modernization, preserving and transmitting those of the traditions which have proved their worth.

I have made these preliminary remarks in order to substantiate the argument that in the presentday process of Hungarian constitution-making the endeavours to establish a second chamber of the legislature cannot dispense with a comparative and historical analysis, which is attempted by this study.

I. On the Second chamber of the Legislature

I believe it would be mistaken to look on the case for establishing a second chamber of the legislature simply as an emotional need for adherence to national traditions. A second chamber within the legislature based on the principle of popular representation was generally regarded as a conservative element in the aspirations to democratization during the great periods of constitution-making in the wake of revolutions and wars. It was increasingly difficult, even within the framework of gradual transformations preserving the continuity of constitutional law, to justify limitations on the competence of the first chamber materializing political representation.

This is well illustrated by the example of the British Parliament. The upper house, existing as a separate entity from the middle of the 14th century, came to lose its weight in government by comparison to the lower house, which was growing in importance. The role of the legislative body as a whole is unaffected by the fact that the highest judicial organ is built into its organization and functions under the same name. After the rise of bourgeois society in England the House of Lords acted as a counterweight of the conservative elite to the elected House of Commons. Under the Parliament Act of 1911 the House of Lords cannot act as a brake in legislation, yet its mere existence serves to bar the way to the emergence of the dictatorship of the majority. Not even the fact that the King's/Queen's speach opening the Parliament's session is delivered in the House of Lords may be considered to be a simple act of ceremony.

The trend to abolition (or further restriction) of second chambers has emerged after World War Two. *The unicameral system is mainly characteristic of smaller states.*

The legislature is unicameral in Malta (from 1947), New Zealand (from 1950), Denmark (from 1953), Sweden (from 1970), Sri Lanka (from 1972), Portugal (from 1974). It was originally unicameral in Costa Rica (1821), Luxembourg (1814), Greece (1864, except in 1927-36), Finland (1906) and Israel (1948). In Luxembourg the rights of the traditional chamber are exercised in part by the Council of State.

In view also of the size of states, *the bicameral system is similarly maintained* in a considerable number of countries, the most evident reason lying in federation, on the basic of which the second chamber in the United States, Germany, Canada, Switzerland, India, etc. serves to ensure the representation of constituent states in the legislature. However, the bicameral structure of constituent states cannot be correlated with the

principle of federation. The legislature is unicameral only in Nebraska of the United States, whereas it is bicameral in Queensland of Australia, in 7 of India's 22 constituent states and in Bavaria of the Federal Republic of Germany.

Georg Brunner distinguishes three models of establishing the representation of constituent states:

– the principle of *direct election* (in Australia, from 1913 in the United States); in Switzerland the Federal Constitution referred the regulation of elections to the competence of the cantonal legislature, which gradually led to the prevalence of this principle; direct election gained general currency in 1977;

– the principle of *indirect election* is more difficult to substantiate in theory; this procedure prevails in Australia and India; in the latter, 12 out of the 243 members of the House of States are appointed by the Head of State from among representatives of cultural life;

– the composition of the Federal Council in Germany is fully based on *executive power* under the Constitution, which gives effect to the principle of federation through this representative organ of the provincial governments (doubly indirect election).

The principle of equality of constituent states is consistently implemented in the United States, Switzerland and Australia, where each constituent state may delegate an equal number of representatives to the second chamber. In Italy, Austria and India the ratio of representatives varies with the size of the population, with some preference given to provinces with small populations.

The composition of the *House of Lords* in England is not based on the principle of representation, but a specified *quality* is the criterion of membership. Recent development has placed increased emphasis on life appointment. Candidates are appointed for life peerage by the King/Queen on the proposal of the Prime Minister. Since the Life Peerages Act of 1958 was passed, peerage by hereditary right has only been granted in exceptional cases. Therefore, apart from the membership of the 26 bishops by virtue of office and from Law Lords, appointments may also be motivated by political considerations.

Most closely akin to the British second chamber was in all certainty the *Hungarian Table of Magnates up to 1918*. The reform in 1926 of the Upper House introduced some elements of senate in the second chamber. The establishment in 1867 of the Canadian Senate, which was to follow the British model, was but a vague attempt at the adoption of that model.

Delegation based on election may grouped by the following criteria.

The principle of *selection by party politics* was constitutionally accepted in the states of the West Indies, but the mandate is limited to the legislative cycle and right to make proposals is shared by the prime minister and the leader of the opposition, while the government party's majority is secured in the senate as well. In Jamaica, of the 21 senatorial seats, proposals may be made by the Prime Minister for 13 and by the leader of the opposition for 8. In Barbados the distribution of the same number of seats (21) is 13:2, with the Governor-General appointing senators to the remaining 6 seats in exercise of his discretionary right. In Bahamas appointments to 16 seats may be

proposed at a ratio of 9 to 4, with proposals for 3 seats to be made by the Prime Minister with the involvement of the opposition leader.

The representation of *regional interests* is not consistently implemented despite external appearances, not even in case of election by the regional legislative bodies. This is evidenced by the example of the French Senate. In 1875 the idea of the central state, which had been based on the involvement of the aristocratic elite, shifted emphasis to a regional basis secouring a greater role for the communes. The election of senators was also governed by this procedure. The ratio at which more than half the electors came from communes with less than 1,500 inhabitants was maintained even during the period of the Fifth Republic.

Regionalism finds a direct expression in the election of members to the Dutch first chamber (elected by the provincial councils). In Belgium the autonomy of linguistic communities is at the same time a territorial autonomy, with the multilingual autonomy of Brussels organized as a separate unit.

The establishment in 1977 of the Spanish Senate ensures the representation of regionalism and autonomous communities. On the basis of the principle of quality, each province directly elects 4 senators, who constitute the majority (208). The legislature of each autonomous territory may elect 1 senator and an additional 1 for every 1 million inhabitants.

The second chamber based on the *idea of equality* is subject to direct election in Italy, Japan, Turkey, Venezuela and Columbia. These countries try to avoid duplication of the first chamber, the completely formal character of the controlling function, by using electoral techniques to encourage a modified distribution of party politics seats in comparison with the composition of the first chamber. Such techniques include eligibility subject to a higher age-limit (Italy, Turkey, Columbia) or a higher age-limit for suffrage (Italy), a longer term of mandate (Columbia), rotation (Japan, Turkey), *ex officio* membership of e.g., former presidents of the republic (Italy, Turkey, Venezuela and lately Croatia), the head of state's right of appointment in recognition of merit (Italy, Croatia, Turkey). While all these supplementary devices or methods make but a small contribution to the operation of the principle of qualitative selection, they are intended to ensure a more objective and more professional atmosphere in the second chamber, which may exert a positive effect in critical situations.

Electors in Norway and Iceland elect one parliament, which divides itself into two bodies. The *Storting* of Norway elects one-fourth and the *Althing* of Iceland one-third of representatives to the upper house. This model, as it observes the mandatory party proportions, hardly differs in substance from a unicameral parliament.

The Senate of Ireland provides a specific exception. When established in 1937, it was governed by the principle of *vocational representation.* As is known, this is an application of the state-building principle based on the social teaching of the Catholic Church and recommended by Pope Leo XIII's Encyclical Letter beginning with *Rerum Novarum.* That principle was also partially applied by the reform of the Hungarian Upper House which introduced membership in the Upper House for chambers and other representative organizations. The Austrian Constitution associated with Dolfuss went

even further, and, by copying the corporative legislature of Italian fascism, it alienated for a long time all political currents from the idea of organization on a vocational basis. The endeavour of the Irish Republic is motivated by the intention of breaking with the British model as well as by the corporative concept, which has gained currency in the Labour Party as well. Of the 60 members of the Senate, 43 are elected from panels of candidates representing five vocational groups (e.g. 11 for agriculture, 9 for industry and commerce, 7 for public administration and social services, 5 for culture and education); senators are also elected by the two universities, and the remaining senators are nominated by the head of government.

II. Relationship between the Two Chambers

The political processes outlined above have run their course in specific environments of constitutional law varying by country. Regulation by constitutional law cannot be reduced to a question of constitutional technique because the constitution-maker, in regulating powers and in balancing procedures to meet cases of dissensus, deliberately creates balances in the interest of averting any possible one-sided or biassed coup or one that might be staged by constitutional procedures.

Ever since the British Parliament broke through the principle of the equality of the two chambers, the *principle of the larger weight, or priority of the first chamber based on general elections* has become a general rule. Such is the case even in countries where the constitution formally declares the equality of chambers. Formal equality is expressed in the constitutions of Italy, Belgium, Columbia and Venezuela. Restriction of powers is perceptible both in participation in legislation and in giving effect to the responsibility of the government. Laws may only be proposed by the first chamber in the majority of cases, while eventual disagreement of the second chamber can at best act as a brake equivalent to the right of suspensive veto, which may be eroded by a two-thirds majority in the first chamber. Adoption of the budget is within the competence of the first chamber, and the estimates may not be altered by the second chamber in most countries.

Compared with the rights of the House of Representatives, the Senate of the United States plays an important role in government as a counterweight to presidential powers. Through ratification of treaties and approval of presidential appointments it controls essential acts of the executive power. Again, the six-year term of mandate adds to its weight, so it is not accidental that membership in the Senate is regarded as being of higher standing on the ladder of political career than membership in the House of Representatives.

In summary, the second chamber performs a function of slight restriction or *restraint* by using its right to preserve traditions, exercise control and give its consent. Nearly all countries have devised schemes of their own. The composition and powers of the second chamber are strongly influenced by traditions that survive also in the prerogatives of the head of state, by the specifics of the electoral system, and by the various patterns of decentralization.

This notwithstanding, the legislative process shows up tendencies clearly perceptible in international comparison and summed up below:

(a) the first chamber usually has a stronger status in proposing laws; in many countries the government may submit bills to the first chamber only;

(b) in more recent times, mainly in countries where the second chamber in the nature of a senate practically repeats the political composition of the first chamber, the government may present bills to the senate as well or may raise the *question of confidence* (Italy);

c) the negative experience of conciliation committees set up to settle disagreements has led to more frequent recourse to faster channels of decision-making, namely to conclusion of a debate by majority decision in joint session, this solution tends to strengthen the position of the first chamber;

(d) the general effect of the British reform of 1911 was in referring items of the budget to the first chamber for decision; the strong powers of the U.S. Senate, which prevent the second chamber being reduced to a role secondary to the House of Representatives, are an exception;

(e) finally, where the conciliation procedure fails, the British Parliament Act of 1911 gives force to the will of the first chamber on the general plane as well. If the House of Commons upholds its position *by three successive votes* against the objections of the House of Lords, the King/Queen will promulgate the law as adopted by the House of Commons. However, the third vote must be taken within two years, so the will of the House of Commons may happen to be broken nonetheless under the opposition of the second chamber.

III. Bicameral Parliaments in Europe

Bicameral arrangements have similarly gained wide currency in other than European countries. According to a survey made by the *Interparlamentary Union* in 1985, 28 out of 83 countries had bicameral legislatures and *12 of these had a unitary state organization*, so there must be some special reason for the bicameral device. In case of a unitary state organization, however, the argument frequently advanced against a bicameral legislature is that it operates as a limitation upon decisions by the first chamber, which is based on democratic elections and thus has broad legitimacy, and unnecessarily complicates the legislative process. The reforms in the Skandinavian states were probably influenced by these considerations, too. Denmark and Sweden have switched to the unicameral system in this century. Indeed, countries with smaller territories retaining the second chamber have almost always invoked historical heritage as a motive for the bicameral system.

The ideology behind the exercise of monolithic power in the former socialist countries preferred the unicameral solution except for the bicameral devices in the federative states (Soviet Union, Yugoslavia and, from December 1968, Czechoslovakia).

Country	Names of Chambers	Term of Mandate	Number of Members
Austria	National Council Federal Council	4 years 6 years	183 63
Belgium	House of Representatives Senate	4 years 4 years	150 71
Croatia	House of Representatives House of Counties	4 years 4 years	100-160 3 by county and 5 nominated
Czech Republic	House of Representatives Senate	4 years 6 years	200 81
England	House of Commons House of Lords	5 years continuous	650 1185
France	National Assembly Federal Senate	5 years 9 years	577 317
Germany, Federal Republic of	Federal Assembly Federal Council	4 years variable	518 45
Iceland	Lower House Upper House	4 years 4 years	40 20
Ireland	House of Representatives Senate	4 years 5 years	250 60
Italy	House of Representatives Senate	5 years 5 years	630 323
Netherlands	House of Representatives First Chamber	4 years 4 years	150 75
Norway	Odelsting Storting	4 years 4 years	116 39
Poland	Sejm Senate	4 years 4 years	460 100
Romania	House of Representatives Senate	4 years 4 years	387 150
Russia	State Duma Federal Council	4 years 4 years	450 178
Spain	Congress Senate	4 years 4 years	300-400 variable by territory
Switzerland	National Council Council of States (Cantons)	4 years 4 years	200 46

In England the government presents bills of high political importance to the House of Commons, but complicated ones requiring long deliberations are submitted to the

House of Lords in order to save time. Bills with financial implications and particularly those affecting the budget are first considered in the House of Commons and, once the House of Commons has agreed on them, are laid before the House of Lords, where numerical figures may not be changed, and the government may, even in case of rejection, present them to the King/Queen for promulgation. Royal sanction is formal, and *since 1707 there has been no denial of signature.*

The scheme under which adoption of law on certain subject-matters like statutory regulation of a federation is made subject to the consent of the second chamber or the right of the second chamber to protest against decisions is intended to avoid the merely formal status of second chambers. The German Basic Law vests such powers in the Federal Council, but, on the other hand, it sets time-limits in order to rule out eventual obstruction by the second chamber.

It should be mentioned that *even a unicameral system* allows constitutional devices for preventing the emergence of "*parliamentary absolutism*", or the "*dictatorship of the majority*". Such external constraints or balances are created by the jurisdiction of the constitutional court, referendum and the head of state's right of veto (or returning statutes). Within parliament, on the other hand, every procedural rule guaranteeing rights for the parliamentary minority — including qualified (three-fifths, two-thirds or four-fifths) majority of votes required for decision, roll-call vote and standing orders leaving mandatory scope for initiatives by the minority — falls into this category. These devices may add up to virtual revision by a second chamber. Thus the final result of the present comparison may be summed up in that, for the most part, *second chambers are no longer relics of the historical past*, but much rather organs with powers extending to *territorial representation* and often to that of *other forms of self-government*, while their function is more than one of acting as a brake because they bring special consideration, socially recognized interests and values into the process of legislation.

IV. The Hungarian Table of Magnates

In the 15th century, with the emergence of the right of the lesser nobility to delegate deputies, the Table of Magnates formed a separate body in the Hungarian national assembly. That configuration was expressed in Statute I after the coronation in 1608. The prelates listed among the magnates were also mentioned in that Statute.

The second chamber functioned with the participation of magnates. At the sittings of the upper table of the feudal Diet during the Reform Era there was a liberal group (*Széchenyi, Batthyány*) acting in opposition to the conservative majority and stating their case with consistent arguments for a bourgeois transformation of society. *The bicameral national assembly, which had come to stay, continued in existence* after Statute IV of 1848 had introduced the constitutional principle of popular presentation *in the course of bourgeois transformation.*

Art. 34 of Statute III of 1848 on the Responsible Hungarian Ministry increased the weight of the Table of Magnates by providing that a minister impeached by the House of Representatives was to be judged by a court composed of members of the Table of Magnates. That power was extended by post-1867 legislation to the President of the Audit Office (Statute XVIII of 1870) and was widened (by Statute VIII of 1871) to include disciplinary authority over the presidents and vice-presidents of the courts of

appeal, the President, Vice-Presidents and trial judges of the Supreme Court Judicature and the Attorney General, and later over the judges of the administrative court.

The reform of the Table of Magnates was covered by Statute VII of 1885, which *did not abolish its feudal character* and was therefore unable to fit the second chamber of the national assembly into the operation of bourgeois parliamentarism. The traditions of the Table of Magnates thus allowed scope for *respecting the historical past, cherishing the memory of historic personalities* and *drawing into legislative work the strand of conservatism represented by magnates and the churches and serving as a tool of control and correction.* Its eight years of recess from 1918 were sufficient for the introduction of new basic principles governing its composition at the time of its reorganization.

V. The Hungarian Upper House

The Upper House was regulated by Statute XXII of 1926, breaking with the Table of Magnates, which presented elements of feudalism. membership in it was generally based on election, but there was no switch to a senatorial system based entirely on election.

The return to a bicameral legislature served political purposes in the first place, but reorganization was highly important from the point of view of public law as well.

Politically, it created a possibility for the compromise between Regent Miklós *Horthy* and the Hungarian aristocracy. The participation of church dignitaries was a no negligible element. Apart from the numerical weight of the prelates of the Catholic Church, one should not disregard the pioneering role played by the Upper House Statute in applying the principle of vocational representation as recommended in *Rerum Novarum.* The Upper House reaffirmed the regime's legitimacy in the eyes of the historical classes. At the same time, by introducing the representation of representative organizations and the county self-governments, it ensured against probable reactions by broader masses of people.

From a public-law point of view, the Upper House demonstrated the end to the provisional state of public law and the return to legal continuity. It sought to adjust the participation of the aristocracy to the requirements of the "democratic *Zeitgeist*" by the election of members from the ranks of bearers of aristocratic titles.

As regards its composition, however, it had two very noteworthy elements which brought new factors into legislation by the second chamber. One was *membership subject to election by municipal committees, which ensured the representation of regional interests.* The other was the *representation of selfgoverning public institutions*, which allowed the involvement of representatives of science and culture. Finally, the political configuration as reflected in the first chamber based on popular representation was supplemented by the representation of representative organizations in the second chamber. I think *it is these factors among those constitutive of the Hungarian Upper House that can be supposed to be organizations with a social weight and values whose participation in the legislature might be realized through a switch to a bicameral national assembly.*

We have drawn up a list of legal titles to membership in the Upper House. It shows that the legislature was moving toward continuous expansion and its membership came to surpass the number of MPs.

Legal title to membership	Stat. XXII of 1926		Stat. XIII of 1928	Additional members	Stat. of 1940		Stat. XXI of 1942	Stat. XX of 1941	Total for 1942
	possible	actual			XXVI	XXVII			
MEMBERS OF THE HAPSBURG DYNASTY	2	2							3
DIGNITY OR OFFICE									
The ensigns of the country	9	4							
The two keepers of the crown	2	2							2
The chief justices of the country	5	5							5
The Attorney General	1	1							1
The President of the Hungarian National Bank	1	1							1
The President of the National Institute of Social Insurance			1						1
The Commander-in-Chief of the Hungarian Army	1	1		-1 Stat. IX of 1940					
The Chief of Staff of the Hungarian Army				1 Stat. II of 1939					1
The senior general of the Hungarian Army				1 Stat. IX of 1940					1
Heads of the Catholic Church	15	14				12		2	29
Heads of the Calvinist Church	6	6				4			10
Heads of the Lutheran Church	5	5							
Heads of the Unitarian Church	1	1				1			1
Heads of the Orthodox Church	1	1							2
Heads of the Israelitic Church	2	2							2
ON THE BASIS OF ELECTION									
Bearers of aristocratic titles	38	38						6	44
Representatives of municipalities	76	76		3 Stat. XXXVII of 1938				47	126
+ called in								3	3
Hung. Acad. of Sciences	3	3							3

Legal title to membership	Stat. XXII of 1926		Stat. XIII of 1928	Additional members	Stat. of 1940		Stat. XXI of 1942	Stat. XX of 1941	Total for 1942
	possible	actual			XXVI	XXVII			
Universities/colleges	15	15						2	17
Hung. National Museum	1	1							1
National Board of the Decorated Ex-Servicemen	1	1							1
Commercial and Stock Exchange	1	1							1
Chamber of Commerce and Industry	6	6	-2						4
Chamber of Agriculture	6	6	1						7
Chamber of Notaries Public	1	1							1
Chamber of Lawyers	2	2							2
Chambers of Engineers	2	2							2
Chamber of Physicians				2 Stat. I of 1936					2
National Federation of Manufacturers; nominated by head of state			2						2
National Union of Agriculturists; nominated by head of state				2 Stat. XLII of 1930					2
Federation of Physicians; nominated by head of state	1	1		-1 Stat. I of 1936					
NOMINATED BY HEAD OF STATE	40	40		4 Stat. XXXVII of 1938	12		4	25	87
TOTAL MEMBERS	244	238		2 Stat. VI of 1939					369
TOTAL REPRESENTATIVES		245							360

The reform of the Upper House was the most successful decision concerning the consolidation in public law of the Horthy regime. The legitimist opposition did not achieve its purpose, but lost a large part of its arguments. The "provisional state of public law", a term used in the pertinent literature, gradually passed into the background and vanished.

The Horthy regime, born under the hallmark of the counter-revolution, was forced by international pressure to hold democratic elections and to establish a new legislative organ. The restoration and reform of the Upper House, which followed the British model in terms of its prerogatives, not only made "good score" for the regime, but also *resulted in a truly system-specific organ*, as it referred to in the current usage of political science.

The Upper House of Hungary reinforced the specifically Hungarian conservatism in public life. Its composition ensured the affirmation of the interests of the class of big landowners, while opening a forum of high prestige for the representation of the interests of industrial and commercial capital.

The further role of the Upper House, which attained internal autonomy, was defined as a counterweight to the introduction of secret ballot. The modifications of 1937, coupled with the extension of the Regent's powers, enlarged the role of the Upper House in legislation.

Statute XXVII of 1937 ensured the predominance of the House of Representatives solely in adopting the budget. Where differences of views on other issues arose, the first thing to do was to attempt an accommodation of disagreements. In case of failure, either House had the right to propose conventing a joint session, which decided by secret ballot without debate.

One-third of seats in the national committees were filled by the Upper House and two-thirds were reserved for election by representatives.

VI. Conclusions

1. Representatives of counties and municipal boroughs had filled seats in the Hungarian Parliament for centuries. The reform in 1926 of the second chamber revived this tradition by giving force to *territorial representation in the Upper House* characteristic of senates, while restricting the feudal vestiges.

Today's "rational" approach rejects out hand the second chamber, which is considered unnecessary in the absence of federation. However, tradition must be invoked on this point. *Municipality* had been a very special institution of the old Hungarian public law, a guardian of national independence for a long period of time. From 1926 the participation of counties in the Upper House was a modernized version of the counties' right to send deputies, and it became a dominant element of the pattern of composition, for the representation of the historical ruling classes, which came to be based on election, was only half that of the counties.

2. The representation in the Upper House of autonomous public bodies may, on the basis of historical experience, be brought into line with the democratic basic principles by making the additional remark that it was supplemented by the representation of representative organizations (chambers) based on compulsory membership and by the participation of elected representatives of representational organizations (trade unions, cooperatives) based on free, individual membership.

3. The pertinent literature refers mostly to ideas rejecting the bicameral legislature. The second chamber is undoubtedly a counterweight to the first chamber based on political representation. This is in itself no reason for ruling out its establishment, since it is precisely in the legislative process that the possibility of creating balances is sought, relying not exclusively on the President of the Republic, the Constitutional Court or referendum, i.e. external factors. The approach and considerations of a second chamber,

specific to its composition, not only act as a brake, or do not simply have the effect of the first chamber taking *a priori* into account the requirement of consent, but include a *new qualitative element*, namely the *control of constitutionality and expediency, the possibility of correction in addition to reconsideration, thus building a constitutional safeguard into the decision-making process.*

4. Given their ideological determinism, their role in upholding values of their own, political parties are unable, despite their best intentions, to articulate and give effect to criteria which a second chamber of a mixed composition is able to bring into the process of legislation.

5. Constitutional law allows political representation to be supplemented with territorial-self-government and corporative elements in such a way as to ensure smooth elimination of "frictions" arising in the course of exercising powers, *prevention of constitutional crises.* Participation of self-governments and representative organizations in the legislature *does not amount to discrimination*, because settlement and territorial self-governments *embrace each and every citizen* and other forms of self-government are equally open or, through compulsory membership, encompass a particular trade or profession as a whole.

6. Representation of nationalities poses a separate problem. What is involved here is positive discrimination, assurance of which is required by the recognition and protection of national or ethnic identity. It is this form of representation that would allow fulfilment of the "state-creating" role of nationalities as laid down in the Constitution.

7. On the basis of votes obtained at democratic elections the political parties share the parliamentary seats proportionally, with some corrections like a threshold of 5% as fixed at present. The government is formed on the majority principle. From that moment the Parliament cannot play its real role, for its control of the government and its initiatives may lead it into labyrinths of complicated considerations. This is why it is necessary to recognize extra rights for the minority in democratic parliaments. The related rules should not stop at governing the exercise of control, for the requirement of a broader consensus serves as a safeguard. A high degree of maturity is therefore shown by the Act which, promulgated on 1 June 1995, requires a four-fifths, as against the current two-thirds, majority for Parliament's adoption of the new Constitution. In addition, we deem it necessary for the *segmentation of society along dividing lines (territorial principle, nationalities, self-governing vocations and representative organizations) to be taken into account in determining the composition of a second chamber.*

There is one question on which the existence of consensus is easy to ascertain from rather widely expressed views. It is generally agreed that the membership of Hungary's present Parliament is *oversized.* I would not, even in case of a bicameral structure, favour any increase in membership. *A first chamber of 200 members and a second chamber of 100 members, with ceilings to be put on these figures, would be just and practicable.*

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KALEIDOSCOPE

Comparative Legal Cultures: Attempts at Conceptualization*

The notion of legal culture is obviously a function of the direction taken by analysis within and for the realization of which one holds some interest in the components and connections of the given legal arrangement(s).

1. Within the frame of the Dartmouth series "The International Library of Essays in Law & Legal Theory", I have edited the introductory volume to the sub-series "Legal Cultures" under the title *Comparative Legal Cultures.*[1] Through my selection and editorial presentation I tried to substantiate the claim for an investigation attempting to describe different legal arrangements characterizing nations and times in the history of human culture (conceived as a way and style of thinking, as well as the social practice institutionally expressing it), separating them from one another by features characteristic to their individual nature, especially by their spirit, inventiveness, and ability to respond. According to the underlying idea, every component and colouring element (from problem-sensibility to the practice of naming, conceptual classification to operational ability, presuppositions to final ideals) falls within the domain of the discipline called Comparative Legal Cultures. As to its composition and basic structure, it is mainly an interdisciplinary knowledge and a want for synthesis that stands in its background, composed of legal-anthropological description, law-historical conclusion, comparison of law, legal-sociological investigation, as well as generalization of legal-philosophical analysis providing a theoretical frame (primarily gained from the doctrinal study and methodology of law).

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* An enlarged version of the paper, presented at the workshop dedicated to the conceptual delimitation of comparative legal cultures by the International Institute for the Sociology of Law (Oñati) in the Summer of 1996.

1 *Comparative Legal Cultures* (ed. & introd. VARGA, Cs.) Aldershot–Hong Kong–Singapore–Sydney: Dartmouth & New York: New York University Press 1992. xxiv + 614 [The International Library of Essays in Law & Legal Theory, series ed. Tom D. Campbell, Legal Cultures 1].

The purpose of launching such a volume was just to awaken an interest strongly missing in our day, which can lay the foundations of a particular subject of teaching and literary production[2] rather than create a new scholarly field and research profile which surfaces as a result of a new methodology. This is all the more true because it does not approach its subject through a systematic survey following objectively determined criteria, but focuses on specifically manifested abilities (i.e., the general spirit, geniosity and inventiveness of a given legal culture), and these can mostly be exemplified in various fields and through embodiments which differ from one legal culture to the other in a way characteristic to the given legal arrangement.

Such an approach may have the advantage that it treats legal culture as a systematically organized unity of cultural responses given to situations crying for adjudication. In the analysis of such situations, it recognizes a variety of possible cultural responses, and approaches them without the strait-jacket (or taxonomy) of paradigmatic preconceptions and previously developed notions. At the same time, it makes legal culture to be seen as the carrier of social values, and in case of the misuse or overuse of its instruments it also counts with the conceptual possibility of a degenerating legal culture. In this century, such inhumane examples as the Socialisms and National-Socialisms in Europe, or the hard-to-treat products of crises caused by stretching the poverty such as the *Jeito* (which appears at the periphery of the Brazilian megalopolis), still prove to be worth analysing from the perspective of Comparative Legal Cultures. We may think of either the potentialities latent in statutory positivism (*Das Recht ist das Recht!*) or the norm-generating effect of the pressure imposed by any overwhelming accumulation of facts, it is the extreme cases that can clearly show what the farthest limiting values of the potentialities latent in everyday normal situations are. For it is only normal values that can be stretched to extreme limits, that is, only normal entities are manifested in them.

Individual legal cultures show a certain condensation of directions and final ideals worth investigation as well. That is to say, besides a few individual traits of inventiveness, the common denominator of the responsiveness of individual legal cultures can be found in the way of thinking (i.e., referring, arguing and concluding) which leads the judge to propose a standardizable solution relying on some previous patterns. By doing so, he/she has to channel the argumentation in a pathway that can relevantly and justifiably refer to, as normatively concluding from, some previously set patterns. At least such a conclusion can be reached by the reconstruction of the logical jump and creative transformation (taken as a black box), which leads from the information procedurally fed into the official processing of the case (as input) to the decision finally taken in the name of law (as output). Within the discipline of Comparative Legal Cultures, the Comparative Judicial Mind has

2 After long preparations the Universiteit Brabant (Tilburg, The Netherlands) proved to be the pioneer by launching a project of Research Chair for Comparative Legal Cultures a few years ago. Professor Pierre Legrand being the chair-holder has experience from his hometown, Quebec, and Lancaster (United Kingdom), and dedicates a number of magisterial papers to the perspectives of the European future of common law and civil law. At Péter Pázmány Catholic University, re-founded in 1991, the Institute for Legal Philosophy plans to introduce Comparative Legal Cultures as a compulsory subject having its own chair within the Institute.

to deal with questions related to it.[3] According to the concept outlined above, legal culture is a phenomenon equally shaped by cultural-historical and institutional development. It shows continuity and stability to a considerable extent within its established framework. It is open to receive new impetuses. Its change can be slow and gradual at the most.

2. Within the framework of the TEMPUS "Textbook Series on European Law and European Legal Cultures" (initiated by Professors Volkmar Gessner and Armin Höland), as the result of a three-year co-operation we have published the opening volume of *European Legal Cultures*[4] which testifies to a strong legal-sociological tradition according to editorial intentions. Legal culture is treated as a descriptive notion in it. It marks a real practice which can be taxonomically mapped out in every culture but can only be said to exist without being bound to any values. Consequently, whatever form or operation it displays, it must be described as a legal culture in action. That is, talking about its distortion and degeneration is excluded by definition.

Within a legal culture conceived like this, formal or formless components can gain equal importance throughout its characterization. This is why we may have included its most varied manifestations in the discussion of European Legal Cultures, e.g., the *travaux préparatoires* and their normative reference as a source of law (especially in the Nordic countries, by the inclusion of the judicial body responsible for future application), the established way of normative reference and quotation in judicial practice, or the problem of (un)translatability (even in case of apparent nominal identity of a mirror-translation in neighbouring countries).

Comparative Legal Cultures as a discipline has to surpass both the dichotomy dividing civil law and common law cultures of Europe and the trichotomy resulting from adding the Byzantine, the Nordic, or the Socialist law to this dichotomy. Considering its influence on the foundation of civilization, no trend in Comparative Legal Cultures can ignore European developments. For instance, it is of an enhanced interest even from a methodological point of view to foresee whether the gap between civil law and common law (i.e., between statutory law and judge-made law, that is, the deductive-systematic and the inductive-pragmatic traditions respectively) will deepen further or, also pushed by the European harmonization, will be somewhat balanced.

Taking Comparative Legal Cultures seriously, it is important to separate the East from the West in Europe as well as the in-between zone from both. Historically and for today's

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3 Under the title 'Comparative Legal Methods' in the volume of *Comparative Legal Cultures*, Part IV, 333–447, and under the title 'The European Legal Mind' in the volume of *European Legal Cultures* (see the next note), Part II, 89–168. As to its legal-philosophical treatment, cf., from the author, *Theory of the Judicial Process* The Establishment of Facts. Budapest: Akadémiai Kiadó, 1995. vii + 249 and 'The Nature of the Judicial Application of Norms: Science- and Language-philosophical Considerations' in his *Law and Philosophy* Selected Papers in Legal Theory. Budapest: Loránd Eötvös University Project on Comparative Legal Cultures 1994. 295–314 [Philosophiae Iuris].

4 GESSNER, V.—HÖLAND, A.—VARGA, Cs.: *European Legal Cultures* (Aldershot: Dartmouth 1996) 586 [Tempus Series: Textbooks on European Law and European Legal Cultures, series ed.: GESSNER, V.—HÖLAND, A. 1.]

generations this primarily means the realization that the borders which divide Central Europe from Eastern Europe have remained unchanged for the fifteen centuries since Charlemagne. Despite the 1945 settlement at Yalta which, acknowledging WWII territorial conquests, placed the major part of Central Europe at Soviet Russia's mercy. This made the new status quo accepted and prevented eventual remorse, cynically calling (as a false ideology) every ceded territory Eastern Europe. These borders coincide with the ones between Byzantium and Rome. Seen from the West, these are the borders up to which the waves of the Renaissance and Reformation extended and the Romanic and Gothic styles can be encountered,[5] for example, at the Eastern borders of the Baltic countries, Galicia and Transylvania, the Southern borders of historical Hungary, as well as the Eastern borders of Slovenia and Croatia. Whatever states may have been artificially set up in terms of the WWI and WWII peace treaties, the cultural heritage of one and a half thousand years still outweighs the conceited naivety staring at us in wide-eyed astonishment (not even forgivable from a detached Atlantic point of view). This naivety would like to exclusively count the distance between Pécs (the Mediterranean intellectual centre of Southern Hungary) and Belgrade (the Serbian Orthodox capital), barely two hundred kilometres along the Danube, as if it were about two neighbouring American settlements and not about the dividing line between two civilizations.[6]

Obviously, however, the genuine question is not the relative difference of Central Europe. One must of necessity differentiate Central Europe from Eastern Europe because (despite the post-modern ahistorical simplicity and ethno-centric utopianism, characteristic of liberal universalism) the East proper, that is, the sovietized tsarist and imperial heritage, is not likely to please us by melting into the West. Neither does the East reach the West, nor does it become its poorhouse (with hundreds of millions of inhabitants), but starts at the point from which it may have continued: to live the Russian past again by raising the dilemma of making the choice between Western European assimilation and remaining different, barely unresolvable for the upcoming few generations. This is so because there is no superior lord with whose cane the ones who want to separate should be taught a lesson. Furthermore, there is no panacea which could help jumping over centuries' belated development without violence or *deus ex machina* intervention. Actually, each player plays his own game, and one has to foreplan the sharpening growth of differences and the building back of the paths of culture which have usually diverged from one another for the reason of different traditions.

3. Cultural comparison raises further dilemmas primarily related to the question of how much longer the instruments can serve as instruments. Do we fall in the trap of overgeneralization and unjustified universalization if we are bound to transform instruments

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5 Cf., for example, SZŰCS, J.: 'The Three Historical Regions of Europe' *Acta Historica Academiae Scientiarum Hungaricae* 29, 1983, 2–4, 131–184. (reprinted in *European Legal Cultures*, 14. et seq.).

6 It was Samuel P. Huntington who largely broke this wall of ignorance, shown in the international (first of all American) settlement of conflicts in the recent Yugoslav war, in his essay rediscovering the old truth, cf. 'The Clash of Civilizations?' in *Foreign Affairs* 72, Summer 1993. 3, 22–49.

into goals by forcing everyone (using the rigour of the law and the spell-words of 'constitutional democracy and rule of law') to apply them, or when we intend to conform them, but ignore the environment originally conditioning them and forget about the challenge that has initially been responded to while creating the instrument? One has to revoke Engels' rather convincing thesis (in his *The German Ideology*) on the ideological overgeneralization and universalization of the winner's interests at any given time. For more than half a century the luckier part of the world has been living peacefully without wars, upheavals or crises bound to raise the tormenting dilemma of life or death. Although, this might be the result of the coincidence of complex effects, and certainly not a reward for merits, we cannot be surprised if this part of the world considers it to have been deserved and substantive enough to justify its path. It will be no wonder if the underlying experience will be sensed as universal and even its boundaries will be forgotten. We should realize that this affords one of the reasons and ways why and how the world has become a global village—by the force of the omnipotent facts of the market, and also in terms of normative expectations transcending all local boundaries. The global village is both a sociological fact and the fulfilment of a Utopia which does not recognize local particularities and historical dimensions (i.e., *hic et nunc* concrete and individual determinations) any longer.

Market economy, the multi-party system, parliamentarism, constitutional democracy, rule of law and human rights: all these magic formulae echo unison in the whole Eurasian region, from Reykjavík to Vladivostok. Still, despite the fact that the slogans and instruments are apparently the same, they bring prosperity and security under Western conditions, but through their contradictory effect they produce further destruction among the ruins of the Soviet-type Communism. What do we mean by all this? There are countries and regions as big as a continent in Central Europe's threatening neighbourhood. Here the state is impotent and anarchy with a disintegrating community constitutes the frames, and the Mafia, eager to seize the power organizes (even by political means) the black market, corruption and crime into one entity practically embracing the whole population. Blind selfishness, personal commitment, the rule of fist-law and violence raise their heads again and prove that only re-feudalizing autocracy can result from any inconsiderate, irresponsible and/or *summum ius, summa iniuria* type application of postmodernism's alluring siren-voice.[7]

We have to keep in mind that culture is bound in its blessings as well. It is historically shaped, therefore, it cannot serve as a panacea or Jolly Joker in any of its components. It is not by mere chance that sensitive viewers have recalled the memory of past failures, especially the one of the American programme on "Law and Development" (set up decades

7 E.g., Vladimir Shlapentokh cries out starting from this recognition in his *Russia* Privatization and Illegalization of Social and Political Life (Michigan State University Department of Sociology, 25 Sept. 1995) 44. [CND (95) 459]. Similar recognitions are slowly becoming a commonplace among the Russian emigrants. See, e.g., BUHARAJEV, R.: 'Az esztelenség logikája: Kísérlet a csecsen konfliktus értelmezésére [The Logic of Folly: Attempt to Interpret the Chechen Conflict]' *Magyarság és Európa* [Hungarians and Europe] III. 1995. 1, 43–51.

ago to join up third world countries), when watching the American democracy-experts and other miraculous healers show up in Central and Eastern Europe.[8] We could learn it from the example of Western intellectuals once having sympathized with Stalin and the revolutionary posers seeking shelter from their frustration in Eastern hopes that the intellectual is a kind of personality who proudly claims to have been ever led by his/her own conviction but sometimes despises facts and common sense as a drag on this inferior mundane life.[9] There is some historical irony[10] in the fact that the last occasion when today's Atlantic powers genuinely took the responsibility for a foreign cause (after WWII when the victors occupied Germany and Japan and reigned over them by military administration, thusly ruling the two countries for their masters' responsibility), they succeeded in disentangling themselves from their everyday routine and tried to find sensitive solutions with empathy, moreover, staffed with considerable intellectual forces.[11] In our days, when the Atlantic world, by its verbal participation and self-interest, has become the bare *voyeur* (or outer observer at the most) of the transformation in Central and Eastern Europe, an army of dandies, arrivists, fantasizers, dreamers and easy experts of international agencies have flooded the region to give hope for remedy through hammering in magic words.[12] In almost a comical way, unknown 'civilizators', who arrive uninformed of the region with a few weeks' commission and leave still uninformed, without having even learnt about its varied historic past and culture, customs and potentialities, fall for the easy happiness of the sheer translation of laws taken out from their pockets and return home with the epoch-making news: "By giving them a (New) World I acted as their transformation's Madison!'.[13] Everything having become so simple, the liberal Utopia seems

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8 E.g., HÖLAND, A.: Évolution du droit en Europe centrale et orientale: assiste-t-on à une renaissance du "Law and Development?" *Droit et Société*, 1993. No. 25, 467–488.

9 Cf. CAUTE, D.: *The Fellow-Travellers* Intellectual Friends of Communism [1973] rev. (New Haven–London: Yale University Press 1988) iv + 458, as well as Paul Hollander *Political Pilgrims* (New York: Oxford University Press 1981).

10 In its first formulation see, from the author, 'The *sui generis* Nature of the Challenge' in his *Transition to Rule of Law* On the Democratic Transformation in Hungary (Budapest: ELTE Project on Comparative Legal Cultures 1995), 71–77 and 'Transformation to Rule of Law from No-Law: Societal Contexture of the Democratic Transition in Central and Eastern Europe' *Connecticut Journal of International Law* 8, Spring 1993. 2, 487–505.

11 Taking the work of only one author as a basis, see, e.g., Bradely F. Smith *Reaching Judgement at Nuremberg*, New York, Basic Books, 1977., *The Road to Nuremberg*. New York: Basic Books, 1981. and *The American Road to Nuremberg* The Documentary Record, 1944–1945, Stanford, Hoover Institution Press, 1982.

12 E.g., BRIETZKE, H. P.: 'Designing the Legal Frameworks for Markets in Eastern Europe' *The Transnational Lawyer* 7, 1994. 35–63. Claus Offe has shown the practical impossibility of the task in his 'Capitalism by Democratic Design? Democratic Theory Facing the Triple Transition in East Central Europe' *Social Research* 58, Winter 1991. 4, 865–892.

13 WAELDE–GUNDERSON [in 'Legislative Reform in Transition Economies: Western Transplants—A Short-Cut to Social Market Economy Status?' *International Comparative Law Quarterly* 43, 1994. 360] emphasise with the ideological narrow-mindedness and the professional self-interest in the push for quick legal *octroi*, instead of carrying out genuine legal reforms.

to have been completed.[14] As a counter-balance to all this, also historicity and the concreteness of Toynbee's challenge-and-response paradigm (which sets history in motion) will fade away, and universal panels imposed from above will start starring instead.[15]

By generalizing timely experiences in the region we can conclude that (1) law is a living system presupposing relative integrity and stability. Every rule or regulatory principle, to be introduced into or interpreted within the system, preconditions a working law and order and a relatively complete legal system. It only comes to surface when systems collapse, or radically change, that whatever new element we may build in, this element will remain unviable without background regulations, conventions, living skills and established practices, or its life will be exhausted in disintegrating dysfunction. Law is a living culture with specific rules, and by replacing some of them we can change its structuring skeleton at most. Consequently, we are bound to fail if we fill the regulatory vacuum with mechanisms designed to achieve final goals directly, without taking into consideration the genuine character, integrity, gradualness, and security of the transformation. Democratizing and liberalizing upon the ruins left behind by the social destruction of the socialist law and order (especially in the Soviet Union) can easily result in libertarian anarchy and the total failure of any public cause. Privatization and market economy can amount to pillage, corruption and black markets. The call-word of human rights becoming the main appeal in amoral nihil can undermine public security, frustrate law and order, and disorganize the functions of state regulation and governmental policing and control. Moreover, (2) the introduction of any new legal solution presupposes a living legal culture in the background, and its future working will be the function of its socially and culturally conceivable and reachable interpretation. Well, if our enlightening zeal makes us blind to this realization, this may ensue in the rituals of the rule of law revitalizing and re-legitimating former totalitarian practices instead of a new start. This way, the freedom of press can easily give way to former press monopolies, and the *summum ius, summa iniuria* type rigour of statutory positivism and the ensuing incapability to think in principles can easily block the way to successfully face (by drawing a caesura on) the criminal past and restore its justice.[16]

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14 FUKUYAMA, F.: *The End of History and the Last Man*, London, Penguin, 1992, xxiii + 418.

15 E.g., AJANI, G.: 'La circulation des modèles juridiques dans le droit post-socialiste' *Revue internationale de Droit comparé* 46, 1994, 4, 1087–1105 and 'By Chance and Prestige: Legal Transplants in Russia and Eastern Europe' *The American Journal of Comparative Law*, LXIII, Winter 1995. 1, 93–117.

16 See, from the author, as an early formulation (concerning the law's definition and shapeability both by text and textual environment), 'Is Law a System of Enactments?' in *Theory of Legal Science* ed.: PECZENIK, A.: Lars Lindahl & Bert van Roermund, Dordrecht–Boston–Lancaster: Reidel 1984, 175-182 [Synthese Library 176] and in *Acta Juridica Academiae Scientiarum Hungaricae* 26, 1984. 3-4, 413-416; (concerning the exclusive interpretability of law from a cultural and socio-historical perspective) 'Law as History?' in *Philosophy of Law in the History of Human Thought* (ed.: PANOU, S.–BOZONIS, G.–GEORGAS, D.–TRAPPE, P.), Stuttgart: Franz Steiner Verlag Wiesbaden, 1988. 191–198 [ARSP, Supplementa 2]; as well as (as a summation of theoretical conclusions by distinguishing the system of positive law from the living legal system) 'European Integration and the uniqueness of National Legal Cultures' in *The Common Law of Europe and the Future of Legal Education* (ed.: Bruno De Witte & Caroline Forder), Deventer, Kluwer Law and Taxation Publishers, 1992. 721–733 [METRO].

Legal culture is a concept full of interest and not only from a theoretical perspective. Revealing its connections from a philosophical, sociological or comparative-historical point of view can become vital to our practical efforts directed towards provoking effects in our unifying world. Therefore, any casual miscarriage of practice can often be attributed to the actor's eventual insensitivity towards the complex social determinations that work for and lurk behind living legal cultures.

Csaba VARGA

The New Croatian Maritime Code*

1. Introduction

After promulgating the Constitution in 1990 (Official Gazette of the Republic of Croatia—hereafter OGRC, No. 56/90) and after declaring its independence by the Dissolution Act of 8 October (OGRC, No. 31/91), the Republic of Croatia embarks upon the task of regulating numerous issues, thus creating a genuine legal constellation and legal system. Part of the above are the rules which govern the field of maritime navigation. So the Croatian Maritime Code (hereafter—CMC) was passed on February 2, 1994, and came into force on March 22, 1994 (OGRC, No. 17/94).[1] The new Code regulates maritime navigation and encompasses all law of the sea, administrative law, property law, contact law, incident of navigation and conflict of laws rules.[2]

2. Structure of the CMC

The CMC extensive text is divided into thirteen parts and has 1.056 Articles.

Part I (Articles 1–5) of common provisions and contains 38 definitions some of which call for certain comments (e.g. ship, boat, ship operator...).

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* To our regret in our previous issue (Vol. 36. [1994] pp. 232-235) we published an article by Dr Dragan Bolanća under a mistaken name. We tender our sincere apologies to the author and the readers and publish here again the article in question with the correct name of the author. *Ed.*

1 The CMC derogated The Maritime and Inland Navigation Law of the Republic of Croatia (OGRC, No. 53/91) which is still on force only for inland navigation.

2 For more details see GRABOVAC, I.: Novo hrvatsko pomorsko pravo, *Informator*, Zagreb, No. 4064, 1993. 1–2.

Part II (Articles 6–47) deals with the fundamental institutes of the law of the sea in the Republic of Croatia (internal waters, territorial sea, exclusive economic zone, continental shelf and right of hot pursuit) which are regulated in conformity with the UN Convention on the Law of the Sea, 1982.

Part III (Articles 48–80) describes the public maritime domain (order and consessions).[3]

Part IV (Articles 81–192) includes safety of maritime navigation (navigable waterways, ports, navigation and pilotage, ship-floating object, boat, ship's crew).[4]

In part V (Articles 193–222) the nationality, identification and registration of ships are elaborated. In this part the CMC adopts the relevant solutions of the UN Convention on the Law of the Sea, 1982 and the UN Convention on Conditions for Registration of Ships, 1986.[5]

Part VI (Articles 223–404) treats law of property matters concerning ships (the rights on ships). The CMC incorporates the clauses of the International Convention Relating to Maritime Liens and Hypothecs of 1926 so that its provisions conform to the rules of the Convention.[6]

Part VII (Articles 405–447) regulates the liability of the ship operator and procedure for the limitation of his liability. The central person in the Law is the ship operator, who is defined as "a natural person or a legal entity who as the holder of the ship is in charge of navigation ventures, the presumption being, until the opposite is proved, that the ship operator is the person entered in the register of ships as the owner of the ship". Substantive-law provisions on the limitation of the liability of the operator are taken over from the Convention on Limitation of Liability for Maritime Claims, 1976.[7] The procedure for the limitation of liability was originally drafted by Croatian law-makers in keeping with the rules of the nonlitigious procedure.

Part VIII (Articles 448–760) deals with contracts (shipbuilding contract, contracts for the employment of ships, contract for maritime ship agency services and contract

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3 Cf. STANKOVIĆ, G.: Pomorsko dobro u Pomorskom zakoniku Republike Hrvatske, *Informator*, Zagreb, No. 4197–4198, 1994, 6–7, ČIZMIĆ, J.: New Law on concession of the Republic of Croatia, *International Business Lawyer*, London, Vol. 21, No. 6, June 1993, 287.

4 In content of part IV the CMC enacted new provisions in the matter of the ship operator's liability for death and physical injury of crewmembers (Art. 161). His liability is based on presumed negligence or strict liability—see BOLANČA, D.: Nekoliko pogleda na materijalnu odgovornost pomoraca de *lege lata i de lege ferenda*, *Privreda i pravo*, Zagreb, No. 5–6, 1993, 399.

5 See HODAK, L. M.: Hrvatski upisnik pomorskih brodova, *Pomorski zbornik*, Rijeka, No. 30, 1992, 259–279. See also STANKOVIĆ, G.: Upis brodova i brodica u novom pomorskom zakonodavstvu Republike Hrvatske (*Informator*, Zagreb, No. 4186, 9), Postupak upisivanja brodova i brodica u upisnike (*Informator*, Zagreb, No. 4189, 17), Neka pitanja u svezi s postupkom za upisivanje brodova (*Informator* Zagreb, No. 4190, 14).

6 GRABOVAC, I.–STANKOVIĆ, G.: Hipoteka na brodu kao stvarnopravni oblik osiguranja tražbina prema Pomorskom zakoniku, *Informator*, Zagreb, No. 4192–4193, 19–20.

7 It is the first convention of maritime law ratified by Republic of Croatia (OGRC-International Treaties, No. 2, 1992)—see BAKOTIĆ, B.: Bilješka povodom početka službenog objavljivanja međunarodnih ugovora u Republici Hrvatskoj, *Zakonitost*, Zagreb, No. 1. 1993. 23.

of maritime insurance).[8] In this connection it should be emphasized that under Croatian law contracts for the exploitation of ships are divided into two groups: maritime contracts, which are contracts for work *(locatio operis)* and hire of a ship *(locatio navis)*, which is a contract of using a ship (the latter contract has been translated as "charter by demise" because this is the nearest to the English system of ship exploitation). The maritime contracts are carriage of goods (the Croatia received the solutions of the International Convention for the Unification of Certain Rules Relating to Bills of Lading, 1924,[9] the Brussels Protocol 1968—Visby Rules and the Brussels Protocol 1979), carriage of passengers and luggage (the CMC follows the instance of the Athens Convention on Shipping of Passengers and their Luggage, 1974, and the Londons Protocol 1976), towing and pushing and other maritime contracts (e.g. biological exploration, pipe and cable laying...).

In part IX the legislator analyses the incidents of navigation (collision of ships, salvage, wreek, general average, tort liability of operator, liability of operator of nuclear ship). In the subject of collision of ships the CMC accepts the provisions of the International Convention for the Unification of Certain Rules of Law in Regard to Collisions, 1910. The institute of salvage consists of the rules of civil and administrative law from the International Convention for the Safety of Life at Sea (SOLAS) 1974, and the International Convention for the Unification of Certain Rules of Law Respecting Assistance and Salvage at Sea, 1910 (with the Brussels Protocol 1970). Also, the new Code adopts some principles from the new International Convention on Salvage at Sea, 1989 (e.g. the payment of a special compensation to salvors according to established criteria).[10]

Part X (Articles 867–988) spells out the legal consequences of the execution and measures provisional on the ships and goods.[11]

Part XI (Articles 989–1009) contains conflict of laws rules.[12]

Part XII (Article 1010–1037) describes the maritime transgressions.

Part XIII (Article 1038–1056) provides the transitional and final clauses.

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8 For more details see GRABOVAC, I.: Neke napomene o posebnostima ugovora o gradnji broda u Pomorskom zakoniku, *Informator*, Zagreb, No. 4204–4205, 13, Drago Pavič Plovidbeno (pomorsko) osiguranje u reformiranom plovidbenom pravu Hrvatske, *Pomorski zbornik*, Rijeka, No. 30, 1992, 237–258.

9 The former socialist Federative Republic of Yugoslavia (SFRY) ratified that convention 1959. The Republic of Croatia has determined its position as to the treaties to which SFRY was a Contracting Party by the Treaties Conclusion and Application Act of 8 October 1991 (OGRC, No. 53/91). According to the transitional provision of Art. 33 of this Act, treaties ratified by SFRY, or to which SFRY acceded, will apply in the Republic of Croatia, if they are not contrary to the Constitution and the legal order of the Republic of Croatia, in accordance with the rules of international law on the succession of states with respect to treaties. According to Art. 134. of the Croatian Constitution, international agreements to which the Republic of Croatia is a party and, in terms of legal effect, have primacy over internal law.

10 See STANKOVIĆ, P.: Nova Međunarodna konvencija o spašavanju na moru, 1989, *Uporedno pomorsko pravo*, Zagreb, No. 2–4. 1989, 296, Ljerka Mintas Hodak: Novi Pomorski zakonik, *Pomorski zbornik*, Rijeka, No. 31, 1993, 35–36.

11 See GRABOVAC, I.-STANKOVIĆ, G.: Osiguranje tražbina u svjetlu novog pomorskog zakonodavstva Republike Hrvatske, review from Zbornik radova: Zaštita vjerovnika, Zabreb, 1994, 61–71.

12 Cf. GRABOVAC, I.: Mjerodavno pravo Republike Hrvatske o pomorskoj plovidbi, *Informator*, Zagreb, No. 4143, 1994, 1–2.

3. Concluding Remarks

The CMC has been enacted in order to provide clear and consistent regulations governing the most important institutes of the law of the sea and maritime law (particularly its administrative and civil aspects). In this field the Republic of Croatia has always most extensively respected the provisions and principles of various international conventions in creating its own maritime legislation. With respect to the maritime orientation of the Republic of Croatia at the time when this recently recognized country is engaged in establishing new proprietary and commercial relations based on market economy and private enterprise, the CMC satisfies the legal requirements of modern sea transport document. The maritime transport is the pillar of the world trade, and for a small economy such as that of the Republic of Croatia, the world market is a *conditio sine qua non* of its existence.[13]

Dragan BOLANĆA

13 Compare BOLANĆA, D.: Položaj Republike Hrvatske u odnosu na pravo i politiku Europske zajednice prema pomorskom transportu, *Pravni vjesnik*, Osijek, No. 1–4, 1992. 149.

Acta Juridica Hungarica
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BOOK REVIEW

1995 Yearbook of Criminology and Criminalistics

The Yearbook of the National Institute of Criminology and Criminalistics has been published for the 32nd time this year. It contains—apart from a single exception—the results of the researches carried out by the researchers working at the Institute.

The subject matters are carefully selected, and this ensures that many people also outside the circle of lawyers find an interesting and instructive reading among the articles published in the Yearbook.

Most authors contributing to the Yearbook represent the field of criminology, thus we may find an analysis of the relationship between corruption and organized crime, crimes against property, crimes committed in gangs, etc.

The other main field of study, criminalistics, is dealt with in two articles; the first examines from a theoretical point of view the place and relations of criminalistics among the branches of criminal sciences, whereas the other introduces to the reader the method of "profile-making" which is applied as a result of comparing sexually motivated violent crimes. The balance manifest in editing praises, unfortunately for the last time, the sense of balance and moderateness of László Pusztai. Because of the sudden death of the director of the NICC, the fellow authors further on may only write about him, but not with him any more.

The article written by *László Pusztai*, with the title "The dilemma of prevention of crimes" submits that beside emphasizing the idea of punishment of crimes, prevention shall be accorded an outstanding role. The author describes the work of the so-called crime prevention councils, analyses foreign experience and draws the conclusion that "where the increase in the number of crimes reaches the limits of unbearableness and its further spreading would endanger the quality of life, conclusions and proposals of scientific research will be taken into due consideration."

Analysing the practice of crime prevention, he mentions two trends: first he speaks about communal crime prevention, which is

formally "a crime preventing strategy for local managing of crimes". Its aim is to realize the outcome of scientific research in practice.

Secondly, the author introduces to us a method originating from the United States called Community Oriented Policing (or shortly, Community Policing). This is basically "the magic word used in the new police strategy, under which it is understood to adjust policing functions to the needs and problems of a regionally defined community."

The lesson of COP is that the cooperation between the police and the population shall be strengthened, because it is only possible to continuously maintain public order and public security based on a such cooperation.

The article written by *Ferenc Irk* with the title "Changing of the political system and crime" is studying the social characteristics of the Central European region, the role of the state modified by the changing of the political system, and the relations between changes in the economy and in moral values.

The author raises the question, while analysing the crimes of our region "if there was a uniform order of values accepted by the entire ruling class?" Hence acceptance of a dominant order of values could mean social stability. Thus it becomes possible that compliance with the legal norms by the citizens be not merely an enforced behavior but a voluntary conduct.

Ferenc Irk divides criminal offenses into two large groups: one covers crimes that raise a feeling of immediate danger and that therefore raise fear in the individual, because he feels incapable of protecting himself against such offenses. The fear from the unknown is especially strong because one feels weaker and more incapable to protect himself, even if the objective level of danger is eventually not higher than usual.

The other category includes criminal offenses the perpetrator of which "takes revenge on the state that had been alienated from the citizens".

The third category of criminal offenses—that remains hidden from the eyes of the citizens, anyway—is organized crime and bribery, and their subcategories (drog-dealing, money laundry, etc.).

The author also searches for an answer to the question why does not continue the increase in the number of criminal offenses as it could be sensed at the beginning of the changing of the political system. One of the reasons for that is that society did not have to face the changes completely unprepared but it had developed a certain "techniqe of surveillance" already in the former regime, and it started to implement it in the new system quite successfully.

Finally, Ferenc Irk deals with the reactions to crime. It is interesting that whereas with regard to organized crime and money laundry the state primarily applies the principle of freightening, general and specific prevention, with regard to juveniles or young adults it attempts to link expediency with the guarantual principles. The aim of the state is obviously to protect the society against criminals falling into the first category and to rehabilitate the citizens that had turned into criminals falling into the second one.

The work by Mariann Kránitz wearing the title "Bribery—organized crime" summarizes the results of her research on the phenomenon of corruption, states that bribery has been connected to organized crime already in Hungary too.

The study analyses the process of development of Hungarian organized crime starting from the beginnings.

The first period was at 1979–80. In the period of "soft dictatorship" a social class evolved that got more and more wealthy, but the prerequisite of its getting rich was committing crimes. A group of so-called "advisors" joins this class the purpose of which is to find out who is wealthy enough to be worth of robbing".

The second period can be dated approximately at 1984–85, when criminals further developed the formerly existing bases, characteristics and adjusted them to the economic conditions that had changed in the meantime. Of course, the amendment of this process with bribery cannot be missing, either.

The so-called "hard core" appears by 1989–90. The system will be completed by that time, and it gains a solid structure through which it can function really effectively. Organized crime forms a kind of "quiet coexistence" with power.

Finally the author describes the present, mentioning four typical phenomena in the field of organized crime, namely: drug-trafficking, trading of weapons and nuclear materials, trading of cars and money laundry.

The paper written by Klára Kerezsi, "Criminal offenses committed by children and juveniles and child victims in Hungary" analyses in its first part the relationship between social integration and criminality. The author submits that the chances for integration in the society have signficantly worsened.

The proportion of people living within a full family has decreased in the past 20 years from 84.2% to 81.3%. The divorce rate has regrettably increased and the proportion of families with only one parent has increased.

In the period of political changes psychological burdens have grown and new and previously unknown problems such as unemployment and financial problems had to be faced. These reasons contributed to that the rate of crimes against property performs a dynamic development.

The author finds it worrying that the number of juveniles among perpetrators of criminal offenses keeps on increasing. The criminal record of young people is worse than that of the adult population and this record is worse in the cities than in the villages.

Klára Kerezsi points out that problems in advising do not only affect the labor market, hence in 1982 11.7% of young criminals were not employed and by 1993 this rate increased to 42.2%.

According to the author, the opinions of legislators differ relating to the treatment of juvenile offenders. They usually cannot choose between the models of criminal sanctions based on proportionality and resocialization.

There exists a further school believing that the conflicts created by crimial offenses may be settled through mediation, reconciliation of the perpetrator and the victim, and restitution.

At the end, the author addresses the problem of children criminals, and the child-aged victims of criminal offenses.

Tibor László Nagy, in the introduction of his article on "Morphology of crimes against property" lists the categories of such crimes.

The feudal period of our history was characterized by an eventual regulation on crimes against property and the priority of customary law. István Werbôczy in the

Tripartitum declares perpetrators of crimes against property as "public haramies".

The first modern Hungarian penal code, the Csemegi Code did not contain the general header of crimes against property. The high quality of this Code can be demonstrated by the fact that criminal justice could not exist without it even after 1945.

Major change was resulted by the Decree No. 24 in 1950, which regulated the protection of social property that has, by that time, become the predominant form of property. Afterwards, several modifications were effected, the most important among which are: Law No. 5 of 1960, Decree No. 28 of 1971, Law No. 4 of 1978, Law No. 18 of 1993. The latter has introduced a new category of criminal offenses, namely negligent embezzlement.

The author further deals with the structure and dynamics of offenses against property. He states that during the seventies the rate of accumulated crimes was stagnating, but from 1980 a gradual, from 1989 radical increase could be measured.

Beside the increase in the number of such offenses, a change in their quality can be sensed, too. More and more offenses are committed in an outrageous, brutal manner. Nowadays there is nothing special any more in the news on robberies committed in underground stations, or gas-spray attacks. The offenders caught at the event of committing the crime often resist their persecutors.

Tibor László Nagy deals further on with theft, stating that this is the most typical crime against property. One of the most well-organized form of criminal offenses is robbery, and the number of robberies into living houses is especially high. It is not rare that offenders unreasonably destroy the apartments they have entered, or even set them on fire. Similarily to the Western-European situation, the number of offenses concerning cars is also increasing.

Frauds are also common. Most typical are the so-called advertisement frauds, and the illegitimate claims for reimbursement of VAT. Crime insurance is also common, as well as false robbery and self-robbery is fashionable.

The relatively frequent armed robberies are usually directed at post offices, financial institutions and petrol stations.

Robbery is the most serious among the crimes against property, thus investigation in these matters is more intensive than usually, as it is indicated by detection rate of unknown perpetrators.

The paper written by Zsolt Németh, Iván Münnich and József Kó with the title "Some characteristics of gang criminality in Hungary" submits in its introductory part that "the phenomenon appeared in a special period of time, after the events referred to as contra-revolution, when the status of power was, even expressing it with a cautious formulation, uncertain, insecure".

Research concerning Hungarian gang-criminality is based on the experience gained in the 1960-ies. At that time, in the composition of gangs, juveniles were represented with 50–60%, whereas adults with 30–35%. There were more boys than girls in these groups, but it is an interesting fact that the rate of those having successfully finished primary school is surprisingly high among these young people. Those studying the personality of gang members often meet intelligent youngsters whose failure to have good marks in school is not due to the lack of their capacities but rather to the lack of their motivation.

Then the authors summarize the results of their research conducted among those punished for offenses committed in gangs.

The studied "gang Z" consisted of 50 members. The members met almost daily between 1968 and 1972, and committed several criminal offenses during this 4-year period.

The authors describe the offenses committed by and the living conditions of each gang member individually. M.J. was sentenced for rape to 2 years in prison, suspended. Since the sentence he leads a normal life. Before his crime, M. J. was an average person. His opinion on his father was positive, his mother meant a mental shelter for him. Still, his life was full of deliquences, such as failing to go to school. He did not intend to get good marks in school, for he was not interested in studying, thus he found amusement in sports. He "does not remember" the offense, he considers the sentence to be unjust. According to the results of the frustration-test, he does not get aggressive in conflict situations; he rather tends to blame himself. It can reasonably be asssumed that he has learnt the lesson from his violations of norms committed at young age, and he would not continue his way towards a "criminal carrier".

It becomes slowly an established tradition of the Yearbook to publish an article written by a foreign scholar. This time it is a work by Hans Heiner Kühne having the title: "New tendencies to avoid enforcement of the punishment of imprisonment". In the author's opinion, the future reform of criminal sanctions in Germany will have to follow two purposes: "first is the higher variability of available sanctions in order to increase the possibility for criminal punishments to be adjusted in accordance with the individual characteristics, the second is a decrease in the level of sanctions in order to declare enforced imprisonment a rare exception in practice."

The author points out that money sentence is the primary form of punishment with its 83%, the reason for which is the simplicity of its enforcement and its positive fiscal effect.

Although probation has proved to be effective, yet it sometimes overrides its success. Therefore it would be important to create an opportunity in the future to provide small groups of probationers with an intensive advising service by probation officers.

Of course, such opportunities are not satisfactory yet, although the relevant German rules and regulations in force do enable an exchange and combination of available forms of sanctions within broad limits. Thus, for example, termination of the proceeding may be connected with an obligation to compensate or payment of a certain amount, or even with a duty to carry out public works.

Interestingly enough, German law in force does not only offer a choice between deprivation of liberty and money sentence but "it creates a gradual system of state sanctions by resorting to orders and directives".

The author analyses the several concepts on enforcement of criminal sanctions and he believes that it would be advisable to introduce the institution of free leave (Freigang) that would enable for the sentenced person to carry out regular activities outside the penal institution without the supervision of the prisoners.

He recalls the institutions of social therapy, under the notion of which such institutions shall be understood where emphasis is laid on treatment.

The article written by József Molnár was given the title "the science of criminalistics" and its starting point is the definition of the notion of criminalistics. According to the

author, "criminalistics, even if not exclusively, is unambiguously practice itself".

Previously there existed another theory as well, claiming that criminology belonged to natural sciences.

Molnár's opinion is closely related to the statement originating from Belkin according to which "the practice of clearing up criminal offenses and their investigation indirectly constitutes the major and fundamental source of knowledge for criminalistics". The most significant characteristic of the science of criminalistics is not its uniformity but quite the opposite: its determininglу significant fractional inner structure".

Hungarian post-war doctrine divides criminalistics into three main parts. The first major part was criminal strategy that contains the functional principles of organs fighting against criminality, their procedural and organizational methods. Criminal technique deals with the implementation of scientific and technical methods serving the purposes of the fight against criminals and investigation. The third composing element is criminal methodology that means the reasonable application of the available technical and tactical methods for investigating the individual offenses.

The author studies the relationship of criminalistics to other scientific branches. He submits that "criminalistics is a complex science serving the purposes of criminal justice that is based as fundamental science on criminal law and that forms a linking chain between criminal law and other social sciences within the system of sciences".

Anna Kiss wrote a paper with the following title "Profile-making as a new method of criminalistics". This article introduces to the reader the method of profile-making that had been worked out for promoting the effectiveness of investigation. Nevertheless, even the supporters of this method concede that this method is not fully able to name the offender, however taking into consideration of the profile certainly narrows the circle of possible suspects.

In making the profile of an offender, it was the starting point of the FBI that humans realize their thoughts in their activities. The detectives in the course of viewing the scene of the crime identify the place of crime and study the so-called key indicators on the basis of which one can draw conclusion with regard to the personality of the offender. As a result of this method, no concrete individual is found but certain personal characteristics and typical forms of activities of the offender are described.

In making the profile of the criminal, several traces can be of help, such as photos of the place of crime, pathological results, physical characteristics of the victim, the crime itself. The Violent Criminals Arresting Program (VICAP), which has been worked out in the United States and functions worldwide since May 29, 1985 helps in implementing this method.

The experts create the profile of the offender based on the several data (such as motives, the mental status of the offender etc.). The strategy of investigation will be determined according to this profile.

In the opinion of the author, only practice can judge the effectiveness and applicability of profile-making. Despite of spectacular successes, no correct assessment can be done on the basis of isolated individual cases.

In England, many profiles have already been done, however, assessment on their effectiveness will only be conducted in the close future. It is not likely, though, that the need for profile-creation would be significant in practice.

This Yearbook—similarly to the previous years—provides the readers with a selection of the latest results reached at the single research center on criminology and criminalistics in the Central- and East European region at an unchanged niveau. It is regrettable indeed, that the price of this volume prevents so many people from placing this book on the book shelf in their homes among the previous volumes of this Yearbook.

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X. CRIMINAL PROCEDURE

Articles

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KENDE Tamás: State aid under the EC Hungary Association Agreement. AJurid. 3–4/93:333–377.

KIRÁLY Miklós: Is Hungary prepared for the accession to the European Community? = Annales Bp. Tomus 34. 1994. 53–73.

LAMM Vanda: Universalismus vs. regionalismus — ad hoc chambers of the International Court of Justice. AJurid. 1–2/92:69–82.

LAMM Vanda: A note on the acceptance of the optional clause. AJurid. 1–2/93:83–89.

LAMM Vanda: Liability for nuclear accidents affecting the environment. AJurid. 3–4/93:313–320.

MAVI Viktor: The world community and the changing notions of universalism and regionalism. AJurid. 1–2/92:57–68.

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Book

LONTAI Endre: Unification of law in the field of international industrial property. Transl. Zoltán Mária. Bp. Akad. K. [1994.] VII, 226 p.

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HORVÁTH Pál: Die Veränderungen des Werbőczy [István]-Bildes. = Annales Bp. Tomus 35. 1995. 51–57.

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PRITZ Pál: Entscheidungsprozesse in der ungarischen Aussenpolitik. 1919–1944. = Gewaltentrennung in Europa. 1993. 173–191.

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XIV. ROMAN LAW

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Vol. 38 **1997** **N° 3–4**

CONTENTS

STUDIES

KALEIDOSCOPE

BOOK REVIEW

Acta Juridica Hungarica
1997 38 N° 3–4, pp. 93–105

1216–2574 / 97 / $ 5.00

STUDIES

Csaba VARGA

Patterns of Thought, Patterns of Law

Law is a culture of concepts. It is an aggregate of norms, institutions constituted from norms, and of facts considered to be their institutional realisation. All of this is placed in a conceptual framework delimiting the law from its environment (called non-law), and creating its internal structure as well. Accordingly, law is a self-establishing creation, cognisable exclusively through its own concepts. For law names and selects itself. That is, the call-words and naming the law provided by itself represent the key to its imagination and understanding.[1]

In the Euro-Atlantic region, the thought-patterns for law are rooted in the formal law of modern statehood,[2] inspired by Roman sources. In the past thousand years, the continental (civil) law, on the one hand, and the Anglo-American common law, on the other, were formed as variations to these patterns. So far, we have been able to conceive any kind of law or legal arrangement on the exclusive basis and to the analogy of these patterns. For instance, our approach to the Jewish law has been based upon its close similarity to them; or the Islamic law, upon the past and extension of its mutual

1 For the interplay between the self-conceptualisation of law and its professional ideology, taken as an ontological factor built in legal epistemology, see VARGA, Cs.: *The Place of Law in Lukács' World Concept.* Akadémiai Kiadó, Budapest, 1985, 193 p. For the proper role of formal qualities (concepts and logic) in the law's actual working, see VARGA, Cs.: *Theory of the Judicial Process.* The Establishment of Facts, Akadémiai Kiadó, Budapest, 1995, vii + 249 p.

2 Cf. VARGA, Cs.: 'Moderne Staatlichkeit und modernes formales Recht', *Acta Juridica Academiae Scientiarum Hungaricae* 26, 1984, 1–2, 235–241, reprinted in his *Law and Philosophy.* Selected Papers in Legal Theory, ELTE Project on Comparative Legal Cultures, Budapest, 1994, 201–207 [Philosophiae Iuris].

relations to them. Yet, one faces problems when the ancient sources of Roman law or the very early forms of Greek law are considered,[3] as these rely on a basically different understanding of the world and creation of worldly orders. This also explains why the so-called primitive law, as well as the Afro-Asiatic—especially tribal, Chinese and Japanese—legal arrangements have remained mostly inaccessible, inconceivable, and, after all, unknown and misunderstood in western scholarship.

At the turn of the century, the debate between legal positivism and sociology focused on the question whether a formalised system of institutions is cognisable and conceptually analysable at all, without having the underlying constituting and formalising rules posited.[4] Today's methodological debates in cultural anthropology argue about whether the institutionalised set of facts of a thoroughly socialised world is approachable at all from a perspective other than an institutional one.[5] While it is the superstructure of so-called primitive societies (partly institutionalised and formalised at the most) that is at stake, its interpretation has already revealed a hardly bridgeable gap in knowledge, with the symbolism of "missionaries in one boat", and the scepticism of "I learn your culture through mine".[6]

This is to say that the openness, free flow and freedom from prejudice of information processes necessarily become a foundational social value for the world to be cognisable. Only open access to information allows the world arrangement based upon differing principles and functioning logic to be learned beyond the reach of own limiting paradigms.

In my paper, I will attempt to flash alternative potentialities for world, order, organising principle and logic of operation—potentialities of a world beyond our own prevailing paradigms, which could have remained unknown and misunderstood in our professional culture, due to traditional Euro-centrism and informational closedness. Owing to different conceptualisation, even new disciplines, such as comparative legal

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3 Cf., e.g., JONES, J. W.: *The Law and Legal Theory of the Greeks*. An Introduction, Clarendon Press, Oxford, 1956, x + 327 p.; GARNER, R.: *Law and Society in Classical Athens*. Croom Helm, London—Sydney, 1987, viii + 161 p.; OSTWALD, M.: *Nomos and the Beginnings of the Athenian Democracy*. Clarendon Press, Oxford, 1969, xiv + 228 p.; as well as MacDOWELL, D. M.: *The Law in Classical Athens*. Thames and Hudson, London, 1978 [Aspects of Greek and Roman Life] and TODD, S. C.: *The Shape of Athenian Law*. Clarendon, Oxford, 1993.

4 Cf. *Hans Kelsen und die Rechtssoziologie*. Auseinandersetzungen mit Hermann U. Kantorowitz, Eugen Ehrlich und Max Weber (ed. S. PAULSON), Scientia, Aalen, 1992, xiii + 119 p.

5 Cf., e.g., FALK, S. M.: 'Comparative Studies: Introduction' in *Law in Culture and Society* (ed. L. NADER), Aldine, Chicago, 1969, 337–348; GLUCKMAN, M.: 'Concepts in the Comparative Study of Tribal Law', in *ibid.*, 349–373; and BOHANNAN, P.: 'Ethnography and Comparison in Legal Anthropology', in *ibid.*, 401–418.

6 In its original formulation, see COHN, B. S.: 'Anthropology and History: The State of the Play', *Comparative Studies in Society and History* 22, 1980, 199. For the whole range of problems in a jurisprudential approach, including origins in Greek and Roman practice, see VARGA, Cs.: *Előadások a jogi gondolkodás paradigmáiról* [Lectures on the Paradigms of Legal Thinking]. Budapest, Osiris, 1996, 1997, 191 p. [Bibliotheca Cathedrae Philosophiae Iuris et Rerum Politicarum Universitatis Catholicae de Petro Pázmány nominatae, II Dissertationes 1].

cultures[7] and comparative judicial mind[8], could have arrived by now at the presentation and description of 'brute' and 'descriptive' facts at the most in want of anything better.

*

When in a comparative methodology of the moral and legal mind[9] we stated that from the words of Jesus Christ, recorded in the New Testament, his teachings cannot be "deduced", we meant not to express something shocking, but to confirm an otherwise familiar philosophical realisation. Taking the opposite stance, if we stated that the teachings of Jesus Christ could be formulated in terms of "conclusions", moreover, they could be aligned into a logical sequence of doctrinal propositions with the definitive rigour of geometry, and he even enunciated them with axiomatic pretensions, we would thereby only declare that although the Master expressed what he intended to with unequivocacy, he did it in a manner that prevented us from acting in an autonomous way. For if we claim that the Law decides everything in and of itself, thanks to its prevalence, there will be no room for doubt any longer, and in return, there will be no room for any autonomous decision either. Since, either breaking of the law or its subservient observation will be the case; *tertium non datur*. Well, there is no law with Jesus Christ in such meaning.

On the other hand, what exists and validates itself in Christianity is the accumulation and superimposition of individual situations generated in the continuity of life at any given time; and we are expected to take an irrevocably personal decision in regard of them. No previous example, case or pattern can afford an excuse, relieving one from the responsibility of taking a personal stand. This is not so because the examples were deficient, or Jesus Christ lived a life too short or too perfect to give examples of sufficient variety and subtlety, or perhaps the Apostles did not perform the job of committing his deeds and teachings into writing with proper faithfulness and completeness. It is simply so—and this is the methodological message—because the

7 Cf. *Comparative Legal Cultures* (ed. & introd. VARGA, Cs.), New York University Press, Aldershot–Hong Kong–Singapore–Sydney: Dartmouth and New York, 1992, xxiv + 614 p. [The International Library of Essays in Law & Legal Theory; Legal Cultures 1]; *European Legal Cultures* (ed. GESSNER, V.–HOELAND, A.–VARGA, Cs.), Dartmouth, Aldershot–Brookfield USA–Singapore–Sydney, 1996, xviii + 567 p. [TEMPUS Textbook Series on European Law and European Legal Cultures 1]; *Comparing Legal Cultures* (ed. NELKEN, D.), Dartmouth, Aldershot, 1997, viii + 274 p. [Socio-legal Studies]; *Changing Legal Cultures* (ed. FEEST, J.–BLANKENBURG, E.),International Institute for the Sociology of Law, Oñati, 1997, 226 p. [Oñati Pre-publications].

8 Cf., e.g., *Comparative Legal Cultures*, Part IV on Comparative Legal Methods, 333–447, and *European Legal Cultures*, Part II on The European Legal Mind, 89–166.

9 Cf. VARGA, Cs.: 'Norms through Parables in the New Testament: An Alternative Framework for Time and Law' in *Time and Law* (ed. F. OST–M. Van HOECKE), Bruylant, Brussels [The European Academy of Legal Theory in preparation]), and, in a larger context, VARGA, Cs.: *Előadások* (note 6), passim.

parables are not meant for such purpose.[10] Several times more parables could still not offer more in such perspective. The pattern of Jesus Christ itself must be taken as an instance, and not as a proposition. It ensures the autonomy of man, and it assumes personal responsibility in return. Should we be exempt from free choice between concurrent alternative decisions personalising the Law, we would have to feel the very construction as damaging to human dignity.

There are cultures in which the freedom of choice and the idea of moral autonomy are so deeply rooted that they cannot allow anything different (especially, external and enforceable regulation of behaviour) to develop. From such perspective, it is but a natural consequence that what we usually (as lead by own cultural presuppositions) call law proves to be the exact opposite to any autonomous, responsible personal choice, as it is based on heteronomy and the breaking of the own will. We may be aware of it, but we are deeply socialised to it. Well, in cultures where such external law forms the basis of social co-existence, we can have only one thing to do: to follow its orders. Moral considerations will not matter any longer. Law conceived like this, as Kant makes clear in a classical way,[11] is built upon a duality in which external and internal—moral and legal—are separated. The former is related to matters of conscience, to what derives from our personality, from our internal substance. Society is not concerned about this directly. What mainly concerns the outside world is that we should not hurt our fellow-men, nor take their things, take advantage of the community's property, and so on. It is with our exterior that we participate in social commerce: this is what we can help or damage society with. In this perspective, it is by no means a criterion how our interior is. Of course, it was clear to Kant that there is a relation between interior and exterior. However, he differentiated between the spheres of morality and legality, knowing that their interaction (its direction or character) is not at all shortcut, immediate or unambiguous. Their co-relation rather reveals a common tendency.

Among the above mentioned cultures the most remarkable has developed in China. This radiated through Korea to Japan. As it is known, China is one of the oldest states in history. Its law is not only developed, but has a long history as well. The Chinese empire can claim an experience even older and more challenging than the Roman Catholic Church. As it is also known, China has always been an empire due to both size and machinery. What we could learn later in Europe as statehood had originally operated in China as empire-hood. Yet, what was used as and for law in Europe had never been considered law in China. The empire-hood of China, undisturbed for

10 For an observation from a methodological perspective, see SEGAL, E.: 'Law as Allegory: An Unnoticed Literary Device in Talmudic Narratives', *Prooftexts* 8, 1988, 245ff.

11 Kant, I.: *Die Methaphysik der Sitten*, in his *Werke*, VII, Berlin, 1916, 14.

thousands of years, produced instruments of control original both in shape and action, differing from the ones in Europe.[12]

Sometime in the 3rd century B.C., for a short and transitional period, one of the thought trends, legalism, prevailed over the others, supported by one of the reigning groups.[13] It focused on enforcing as the basis of law one of the components of the indivisible tradition of Chinese law, the layer of *fa*. The dynasty concerned was soon abolished, and the former viewpoints of Confucius became prevailing again. Thus, China could organise social co-existence undisturbed—all the more, as the next falter could lead China into temptation two and a half thousand years later under the Communist rule of Mao Tse-tung. In the so-called big-jump period (also called the Cultural Revolution) China gave up its modern culture of formal law, adopted by the end of the century under European (German and French) imperialist pressure for modernisation, later furbished through Moscow mediation in order to meet the requirements of power centralisation. Thus, instead of any rule of formal law, China allowed a non-formal patriarchal agent to prevail which gave free scope for political-social influences at any given time and which—at least according to Western evaluation—resulted in anarchy, unforseeability and unreliability. Comparative historico-philosophical analyses have proven that through loosening the framework of formal law China has actually returned to her cultural antecedents and own traditions, but in a distorted form, artificially leading to a forced path, and with a frightful falter indeed.[14]

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12 For the basic notions of Chinese law, see DORSEY, G. L.: 'Two Objective Bases for a World-wide Legal Order' in *Ideological Differences and World Order*. Studies in the Philosophy and Science of the World's Cultures (ed. NORTHROP, F. S. C.), Yale University Press, New Haven, etc. 1949, 442–474, and KIM, H. I.: *Fundamental Legal Concepts of China and the West*. A Comparative Study, Kennikat Press [National University Publications], Port Washington—New York—London, 1981, xiii + 175 p. For its complexity, see LEE, L. T.—LAI, W. W.: 'The Chinese Conceptions of Law: Confucian, Legalist and Buddhist', *Hastings Law Journal*, 29, 1978, 1307–1329, as well as MELKEVIK, B.: 'Un regard sur la culture juridique chinoise: l'École des légistes, le confucianisme et la philosophie du droit', *Les Cahiers de Droit* 37, 1996, 3, 603–627. For the flexibility of Chinese law, see BODDE, D.—MORRIS, C.: *Law in Imperial China*, Harvard University Press, Cambridge, 1967, 21; PEERENBOOM, R. P.: *Law and Morality in Ancient China*. The Silk Manuscripts of Huang-Lao, State University of New York Press, 1993, xvi + 380 p. [SUNY Series in Chinese Philosophy and Culture].

13 E.g., HULSEWÉ, A. F. P.: 'The Legalists and the Laws of Ch'in' in *Leyden Studies in Sinology* (ed. IDEMA W. L.), Brill, Leiden, 1981, 1–22; and Thought and Law in Qin and Han China. Studies Dedicated to Anthony Hulsewé on the Occasion of His Eightieth Birthday (eds IDEMA W. L.—ZÜRCHER, E.), Brill, Leiden—New York—København—Köln, 1990, ix + 224 p. [Sinica Leidensia XXIV]; as well as GRAHAM, A. C.: *Disputes of the Tao*. Philosophical Arguments in Ancient China [1989, Open Court, La Salle, Ill., 1991, para. 3: 'Legalism: An Amoral Science of Statecraft', 267–292; and ZHIYONG, W.: 'Le positivisme juridique dans la Chine ancienne' in *Legal Systems and Legal Science*. Proceedings of the 17th World Congress of IVR, VI (ed. PAVCNIK, M.—ZANETTI, G.), Steiner, Stuttgart, 1997, 58–70 [Archiv für Rechts- und Sozial-philosophie, Beiheft 70].

14 Cf. VARGA, Cs.: *Codification as a Socio-historical Phenomenon*. Akadémiai Kiadó, Budapest, 1991, 239–242, especially at note 73.

According to Confucius, only a measurement capable of giving subtle answers, and expressing nuances supports man in his moral capacity. Sharp contrasts, extreme formulations can hardly go with it. In China it is assumed that we all represent moral quality, and hold internal values. Therefore, we have to assume to be able to decide what we need to do in various situations. We should act not for others' sake, not for gods' or fellow-men's appreciation, and especially not simply to do good or to meet requirements set by external norms. The conformity of legality is unknown in this culture. Instead, the fulfilment of moral quality has to make us act, that is, to live our life in a way, as expressed by the Japanese, "not to lose our face". Anyone forcing a judgement on us would surely cause more damage than the eventual moral disapproval of our environment. That is to say, experiencing our autonomy comes first, and what it suggests comes only after.

In various practical situations, in the Chinese culture of autonomy the event which caused the tension is approached carefully, from a distance, and avoiding all formalities; instead of directing the dispute to a forced channel, predefining its outcome, or rephrasing it through norms so that the other party should be defeated. Conflicts of the past, or considerations and arguments brought up once in their resolution are referred to, if at all, as memories only. The discussion is kept among such frames that the partners agree on decisive questions by themselves. Their approach to the merits should neither lead to extreme and repelling formulations, nor harm the other. Not being a polarised opposition between their status, there will be no extreme result either. Not having a plaintiff and a defendant, there will be no winner and loser either. The participants debate in merits as equal partners, aware of being doomed to a common fate both as humans and moral beings. They can only achieve their respective goals together. For the peace of society can only be restored if they have returned to the everyday life "keeping their face".

The sides in the dispute are expected to know how to reach a resolution by themselves. Their whole community is responsible for it (by no means only indirectly or in a symbolic sense). In order to reach it, a third person, mutually acceptable for their communities, takes usually part in the resolutions. For China was the statehood of an empire of incredible dimensions. The state power relied on winning mutual acceptance for and transmitting the tradition of common values, considered by far more important than the individual life with a narrow personal perspective. The apex value was the empire's life and continuity. Therefore, there was a need (and not on a village, town, district, or county level, but on the mandarin-administration level, extending to huge regional units) for building in safety valves to ensure that trivial everyday quarrels were solved from own sources. The only real empire-level regulation was practically born within this circle. For the persons concerned had to know how to solve their disputes. They had to do so within such limits that the dispute should not degenerate. The respective community had to bear direct responsibility for it. Thus, they avoided with apparent success the extreme trap of both personal fall and damaging

the community.[15] On the other hand, when no resolution was arrived at in the community, the case unavoidably went to the mandarin. Instead of administering justice, his task was to punish those who proved to be unable to find the ways of a just resolution. He proceeded in a manner that the mere fact of turning to him should generate a repressive effect, and, next time, the communities would favour prevention of dispute-degeneration by effectively resolving it in merits.

The point here is not simply about the opposition of non-formal and formal patterns of conflict-settlements, but also about a legal-anthropological basic situation.[16] Namely, sometime somewhere a dispute occurs. This situation is considered injurious by someone. Somebody ascribes it to somebody else, considering him responsible for the situation. Usually, the situation can be solved by those involved. This is the non-formal resolution of dispute, avoiding a formal decision, which would declare one party the winner and the other the loser. In consequence, the dispute and the underlying conflict will vanish completely. Even the memory that once a difference has occurred disappears in the mist of the past. In the European culture of the formal settlement of conflicts, however, one turns to an outsider to reach a decision. The decision-maker, as formal authority, will polarise the disputed terms into one of the exclusive alternatives of "he is right" and "he is not right", artificially putting an end to the conflict and formally naming one winner and one loser.

Let us continue the intellectual journey through the so-called primitive tribal practice of Papua New Guinea. When an injury occurs and cannot be solved by those involved, it will become a case of the community. If not solved promptly, it will affect a widening group among the tribe in question. If no solution is presented by the tribe, ultimately the tribes (communities) concerned will drift into conflict. Under so-called primitive conditions, without institutionalised courts and formal decision-making fora available, this can lead to a feud. One of the sides, not tolerating the unresolvedness any longer, openly announces breaking off, a process that will irrevocably generate violence or cause damage.[17]

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15 As it is known, the rigid followance of the principle *Fiat iustitia, pereat mundus!*, and the obsessed community-deteriorating chase of justice, may equally produce victims. For the classic interpretation of the relentless desire of truth, based on the work of Heinrich Kleist, see FINK, A.: 'Michael Kohlhaas — ein noch anhängiger Prozeß: Geschichte und Kritik der bisher ergangenen Urteile' in *Rechtsgeschichte als Kulturgeschichte*. Festschrift für Adalbert Erler zum 70. Geburtstag (hrsg.: BECKER, H.-J. & al.), Scientia, Aalen, 1976, 37–108, as well as SENDLER, H.: *Über Michael Kohlhaas — damals und heute*. de Gruyter, Berlin, 1985, 45 p. [Schriftenreihe der Juristischen Gesellschaft zu Berlin, Heft 92].

16 For an overview, see *Law and Anthropology* (ed. SACK, P.), Dartmouth, Aldershot, etc., 1992, xxx + 527 p. [The International Library of Essays in Law & Legal Theory: Legal Cultures 3].

17 E.g., *Law and Warfare*. Studies in the Anthropology of Conflict (ed. BOHANNAN, P.), The Natural History Press, Garden City–New York, 1967, and POSPÍSIL, L.: *The Anthropology of Law*. A Comparative Theory, HRAF, New Haven, 1974, 2, as well as POSPÍSIL, L.: *Kapauku Papuans and Their Law*. Yale University Department of Anthropology, New Haven, 1958 [Publications in Anthropology 54].

What is broken in such a case is called *shalom*.[18] It means peace, the maintenance of which is the cardinal issue in a Jewish community,[19] for being an indispensable prerequisite to its survival. A community drifted into war for whatever reason has the chance of its future existence to become questioned or undermined. Hostility would even exclude the mere chance of future resolution. It would eventually declare one of the parties victorious, and the other defeated. Breaking of the equilibrium, and the intention to balance it out can easily lead to the community's moral or physical annihilation. Then the *shalom* is over, at least for an extended period of time. As a natural consequence, brute victory can easily incite revenge, back strike, or renew the struggle.[20]

Hostility, endangering the whole community, must be blocked, and prevented at all costs if possible. Mandarin justice comes into sight under such conditions. The mandarin, as the emperor's representative, can only apply imperial laws. This is the emperor's law. It is not meant to provide just and equitable patterns for individuals of the population (constituted by groups of various order and rank), as opposed to the Roman-rooted procedural pattern with an individualist life-ideal that does it in Europe. The imperial law is not meant for taking a decision for the individual directly concerned. In a situation when the *shalom* is the prerequisite for peace, and peace for the survival of the community, the emperor's law must opt for communal existence, instead of caring about justice or equity for the individual person. The subjects themselves and their communities have already had plenty of time and opportunity to do this. If they could not, the consequences will fall upon them, too. The very fact of having turned to the mandarin proves that they undertake the state of unrest. So the final goal is that the ones involved in the conflict should resolve it from the very beginning, putting all their power into scale, and by no means stretching the strings by increasing

18 For the source of Jewish law, see DORFF, E. N.—ROSETT, A.: *A Living Tree*. The Roots and Growth of Jewish Law, State University of New York Press, Albany—New York, 1988, xv + 602 p.; and SCHIMMEL, H. C.: *The Oral Law*. A Study of the Rabbinic Contribution to Torah She-be-al-peh, Feldheim, Jerusalem—New York, 1971, 170 p.; for its cultural (religious and philosophical) environment, FALK, Z. W.: *Law and Religion*. The Jewish Experience, Mesharim, Jerusalem, 1981, 238 p., and JACKSON, B. S.: 'Ideas of Law and Legal Administration: A Semiotic Approach' in *The World of Israel*. Sociological, Anthropological and Political Perspectives (ed. CLEMENTS, R. E.), Cambridge University Press, Cambridge, 1989, 185–202; for its moral determination, SILBERG, M.: 'Law and Morals in Jewish Jurisprudence' *Harvard Law Review* 75, 1961, 306–331; for the traditions of making it liveable in a state environment, see SILBERG, M.: *Talmudic Law and the Modern State* [1961], The Burning Bush Press, New York, 1973, xiii + 224 p.; for its orientation towards duties instead of rights, STONE, S. L.: 'In Pursuit of the Counter-Text: The Turn to the Jewish Legal Model in Contemporary American Legal Theory' *Harvard Law Review* 106, 1993, 4, 813–894; for its contradictory nature, JACKSON, B. S.: 'Jewish Law or Jewish Laws', *Jewish Law Annual* 8, 1989, 15ff, especially at 19–23.

19 E.g., PÁKOZDY, L. M.: 'Törvény és igazságszolgáltatás a Bibliában' [Law and Administration of Justice in the Bible] in *A Biblia világa* (ed. RAPCSÁNYI, L.), MRT Minerva, Budapest, 1972, 145.

20 It is remarkable that the "law of the jungle", formulated in Rudyard Kipling's poem *The Second Jungle Book*, is built upon the "judicious mixture of individualism and collectivism" within social co-operation, and not on the unlimited and merciless pursuit of individual concerns. See MACKIE, J. L.: 'The Law of the Jungle: Moral Alternatives and Principles of Evolution' *Philosophy* 53, 1978, No. 206, 206ff.

tensions in the hope that the stronger, more aggressive and persistent will end by winning or getting more.

It is incredibly warning to modesty that this culture, usually called primitive, was so much thought-through and consistent, proving great wisdom. Only prejudice may qualify this law to have been undeveloped. Yet, in almost every tribal community one can find the realisation that there is an optimum, and the resolution of conflict has to be done within it. It is the responsibility of every one to find a resolution in their own case. If the sides in the dispute cannot reach it, then their community—through the mediation of the local sage, priest or teacher—must take the case over, so that the situation causing the conflict will be reconsidered, and the dispute resolved.

In every conflict-resolution arrangement there is a point which defines how far the dispute or, eventually, its degeneration into hostility can go.[21] If the events transcend this, the whole judgement may easily turn over. Beyond this point not the one will be right who might have been at the time when the injury was still hidden and the dispute latent. Neither will the one with whom the search for truth degenerated into coarse shapes. The blame has to be taken by the one who, by over-claiming and relentless desire for truth, did not promote acceptable ending still equitable for everyone. Responsible will be the one who pushed his personal affair up to an extent threatening the community's existence, ignored *prudentia*, and proved to be incapable of reaching a compromise at the right time.

The ideal of Confucius in China was the *li*. According to its conception, we were all born to be sovereign, autonomous moral beings. All of us must know what we deserve, and what is equitable in a given situation. Therefore, the *li* encourages us to resolve any dispute directly as inspired by our human inside, paying attention to the dignity and moral integrity of our fellow-men as well. Our moral order is autonomous, as it was born with us, and its actualisation depends on us. As opposed to it, the imperial law—the *fa*—has the only task to maintain imperial existence, the security and peace of the empire. The moral autonomy presupposed by the *li* is not simply an opposite of the heteronomy represented by the *fa*, as the latter is not calibrated to administer or ponder about justice between quarrelling individuals. It can only be used according to its purpose, so that the disapproval of the parties in failing to compromise is expressed. Therefore the *fa* was to deter and punish—in and for itself. Its ultimate goal was not to be taken advantage of, and anyone who experienced it should not wish it happen again. Anyone once getting involved, even as a witness, with the mandarin's *fa* was surely crushed. It was repressive, since the one who forced external authority to remedy the own injury "has lost the face". It had a social preventing force, because the poor soul who was just summoned in front of the imperial official as a witness could be thrown in jail, his/her properties could be confiscated, even though was only a witness, and if questioned, most likely told the truth.

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21 E.g., ROBERTS, S.: *Order and Dispute*. An Introduction to Legal Anthropology, Penguin, Harmondsworth, 1979, 117ff [Pelican Books].

Thus, the *fa* is designated to the empire, and not to set imperial machinery in motion in petty affairs. Conflicts must be solved when and where they occur, without risking their aggravation, causing trouble beyond their own sphere, and plunging imperial peace into danger. For even the most personal and insignificant affairs can degenerate into hostility of imperial extensions, if the principle of *fiat iustitia, pereat mundus!* is inconsiderately and selfishly followed.

It is not by chance that either in China and Japan, or in tribal cultures, the notion of right and righteousness has not even been invented.[22] After all, what is right? The legal theory of Marxism, from its own positivist point of view, denied the notional independence of *ius* [right; *'subjektives Recht'*], and only recognised the notion of objective law, the *lex* [law; *'objektives, gesetztes Recht'*], as an independent component. It considered the former to be only a derivative (projection and consequence) of the latter. Without taking a stand,[23] we can realise that talking intelligibly about right presumes a law that serves as a basis, be it enacted or only mentally anticipated. For positive order can be assumed as enacted by the free will and absolutism of man, and also as derived from godly order. This is natural law, according to the western world concept.[24]

Well, one can question whether there was legal order in China at all. For Chinese traditional culture was built on the harmony and mutual functioning of morally autonomous beings to an extent almost equivalent to denying any concept of law. At the same time, the *li* presupposes that we are independent islands in the sea of one common moral order, creating our laws for ourselves, even if these laws have to promote peace and order in the whole community by their action and overall effect. Failing to do so, we would have to turn to the procedure of the *fa*, anticipating our own crush and moral breakdown, so that the autonomous order of the community could reach its equilibrium again.

In Japan there exists the *giri* morality,[25] which in relation to law is the equivalent of the Chinese *li*.[26] It is omnipresent, indestructible and resistant. Japanese culture

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22 E.g., BÜNGER, K.: 'Entstehen und Wandel des Rechts in China' in *Entstehung und Wandel rechtlicher Traditionen* (ed. FIKENTSCHER, W.–FRANKE, H.–KÖHLER, O.), Alber, Freiburg–München, 1980, 465ff [Veröffentlichungen des "Instituts für historische Anthropologie E. V.", Band 2].

23 Cf., e.g., as a monographic summary, WELLMAN, C.: *A Theory of Rights*. New Jersey, Totowa, 1985, and in the mirror of studies covering the field, *Rights* (ed. NINO, C.), Dartmouth, Aldershot, etc., 1992, xxxiv + 466 p. [The International Library of Essays in Law & Legal Theory: Schools 8].

24 Cf., e.g., in the mirror of studies covering the field, *Natural Law* (ed. FINNIS, J.): Dartmouth, Aldershot, etc., 1991, xxiii + 354 p. [The International Library of Essays in Law & Legal Theory: Schools 1, 1–2]. Its nature-like social bases are revealed by LAMPE, E.-J. in *Grenzen des Rechtspositivismus*. Eine rechtsanthropologische Untersuchung, Duncker & Humblot, Berlin, 1988, 227 p. [Schriften zur Rechtstheorie, Heft 128].

25 E.g., NODA, Y.: *Introduction au droit japonais*. Dalloz, Paris, 1966, title IV, chapter III, 191–200 [Les systèmes de droit contemporains XIX].

26 E.g., RAHN, G.: 'Recht und Rechtsverständnis in Japan' in *Entstehung und Wandel rechtlicher Traditionen* (eds FIKENTSCHER, W.–FRANKE, H.–KÖHLER, O.), Alber, Freiburg–München, 1980, 486–487; as well as BÜNGER, K.: 'Entstehen und Wandel des Rechts in China' in *Entstehung und Wandel rechtlicher Traditionen* (ed. FIKENTSCHER, W.–FRANKE, H.–KÖHLER, O.), Alber, Freiburg–München, 1980, 460. Cf. also HALEY, J. O.: 'Sheating the Sword of Justice in Japan: An Essay on Law Without Sanctions' in *Journal*

and language are embedded in its idea so much that moral dilemmas in limiting conditions, characteristic to the western push for notionalisation and systematisation, cannot even be formulated in them.[27] For instance, moral schematism with axiomatic pretensions would be unimaginable in Japan, which—as the prototype of confession handbooks with entire catalogues of moral sins—*ab ovo* classifies the taxonomy of our falling into sin. Thereby it could only trivialise its occurrence into the mere actualisation of a series of previously notionalised, expressed and systematised eventualities, as the case of the finite realisation of situations of infinite variability. This is why it could be inconceivable in Japan, as it unwillingly suggests that it is not enough that I have sinned; it is not enough that I have given account for my sinful deed; it is not enough that I do penance for my sin; furthermore, I must also attach a taxonomic classification to it (indeed: just as if I were approaching the living world as Carl von Linné did, or the elements of nature as Dmitri Ivanovich Mendeleev did), so that we can be assured of what subcase and variety, or exception to the case I have committed. In such a schematism it is not likely that we will be able to achieve the complete catalogue of human sins. It is not likely that we will give way to catharsis at the end. It is not likely that finally we will focus the rest of our attention on the reparation of its irremediable consequences. For, in ultimate analysis, every circumstance we can think of will be conceived as the case of a closed and somewhat rigid classification scheme.

A Japanese never talks about emotions or moral things. As for us, westerners, who are used to communicating about our moral wretchedness, fears and anxieties, digging deeply into the subconscious remindingly of a vivisection, we all are infected—and inasmuch corrupted—by the idea of notional strictness. For we name everything, and conceptualise everything. We even notionalise things that are morally unimaginable, even what derives from schemes of notional combinations merely as a logical

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of Japanese Studies 8 (Summer 1980) 2, 265–281. For a summary, see HENDRY, J.: *Understanding Japanese Society*. Croom Helm, London—New York—Sydney, 1987, 218 p., especially ch. 12 on 'The Legal System and Social Control', 185–201 [The Nissal Institute / Croom Helm Japanese Studies Series], and VOGEL, E. F.: *Japan as Number One*. Lessons for America, Harvard University Press, Cambridge, Mass. & London, 1979, xiii + 272 p., especially ch. 9 on 'Crime Control: Enforcement and Public Control', 204–222.

27 "In the English manner of writing, the meaning becomes clear, but at the same time it becomes limited and shallow. [...] We do not make such useless effort, but use those words which allow sufficient leeway to suggest various things, and supplement the rest with sensible elements such as tones, appearance of letters, rhythms, etc. [...] of the sentence [...], whereas the sentence of the Westerners tries to restrict its meaning as narrowly and detailedly as possible and does not allow the smallest shadow, so that there is no room at all for the imagination of the reader." The novelist Tanizaki JUNICHIRO quoted by Kawashima TAKEYOSHI in his 'The Status of the Individual in the Notion of Law, Right, and Social Order in Japan' in *The Japanese Mind*. Essentials of Japanese Philosophy and Culture [1967], (ed. MOORE, Ch. A.), University of Hawaii Press, Honolulu, 1987, 263. About the notion of change resulting from thought cycles and not from logical evolution, see ABEGG, L.: *The Mind of East Asia*. Thames and Hudson, London—New York, vii + 344 p., especially ch. II (Thought without Logic), 23–68. In a strong critical approach, cf. DALE, P. N.: *The Myth of Japanese Uniqueness*. Croom Helm, London—Sydney; University of Oxford Nissan, Institute for Japanese Studies, Oxford, 1986, ch. 7 on 'Silence and Elusion', 100–115 [The Nissan Institute / Croom Helm Japanese Studies].

possibility. Through this we almost challenge the horror—under the pretext of the neutrality of logical examples—to become true. We make an advance of everything, at least in imagination. At the same time, we depersonalise our most personal things, as we tame our most intimate fears we are even afraid to overthink, and our most hidden bad dreams, only to transform them into a case of previously formed conceptual schemes and classes. After all, ever since notional culture has developed, we seize things not in their fallible existence, but break them into a sequence of prefabricated schemes built on previous judgements while providing them a taxonomically value-free description.

Communication in the Far East is simply not meant to confer on man's personal matters, morals and parables. The Japanese go out into the woods, amongst the flowers, watch the stone-garden or the holy mountain, and contemplate. The ornamental garden of stones, the majesty of the Fujijama, or the cherry-blooming: all of these bear more messages to them (as they make them realise more) than any abstract reasoning. The Japanese reason not with casual partners in a smoky café, rather talk to the holy place or favourite flowers amidst nature. It is not by mere chance that in Japan the stone-gardens, taken care of as representatives of human values and natural harmony, have been the workshops of spiritual recharging for hundreds of years.

Thus, taxonomic naming and axiomatic conceptualisation cannot be part of the Far Eastern world concept, because they would exclude subtle thinking. Therefore, many things resist to be discussed at all. In Japan, modernising effects were intensified by the American influence which, through the measures of occupation, also introduced modern formal law, such as: laws, contracts, collective agreements, compensation, formal suing and courts. Will the new pattern prevail? Society is actually left cold by the question: what is hidden in its means and what possibilities they bear. Working place identification and other attachments are incorporated into a moral and emotional ambience of solidarity, bearing more importance to them than anything else their money could buy. At working places—be it small or large—disputes are not characteristic at all, not even trade union fights. Bosses direct mainly not by orders or manifestations of authority, but rather by setting examples.

Human organisation has strange varieties.[28] Our examples above might seem miraculous—if we are unable to make them natural by explaining their circumstances. It is another question that relying on the storehouse of different traditions, who and with what prospects can step into the 21st century, the roots of which might seem European yet are—more and more visibly—dominated by American ideas. It is a further issue whether, for the rest of the world, it is feasible to—and especially: worthwhile to—follow

28 For a cultural comparative-historical approach, see, e.g., MAY, R.: *Law & Society East and West. Dharma, Li, and Nomos: Their Contribution to Thought and to Life*, Steiner, Wiesbaden, 1985, especially at 118–200 [Beiträge zur Südasienforschung, Südasien-Institut, Universität Heidelberg, Band 105].

this end-of-century western pattern. We can only remember that the ending of history[29] has always proved to be a Utopia, and the wish to preserve different human and civilisational patterns is not an anthropologically romantic vision of getting away, or a mere fantasy about the past.[30]

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As our case-study shows, the intellectual appropriation of a different world may not only expand our own horizons, but also enable us to envision our usual arrangements, routinised into imperception notwithstanding its excellence, from new perspectives. Thanks to openness towards information, we can confirm our own paradigms by comparing and confronting them with ones of other systems of thought, and we can also repeatedly test its limits and limitations more and more securely by challenging its efficiency.

29 Newly, under a liberal disguise, see Francis Fukuyama *The End of History and the Last Man.* Penguin, London, 1992, xxiii + 418 p.

30 As an influential stimulation, cf. René David 'Deux conceptions de l'ordre social' in *Ius Privatum Gentium.* Festschrift für Max Rheinstein, I, Mohr, Tübingen, 1969, 53–66, and DEKKERS, R.: 'Justice bantu' *Revue roumaine des Sciences sociales: Série de Sciences juridiques* XII, 1968, 1, 56ff. Recent literature seems to reassure reasonable doubt and openness towards different cultures. See, first of all, SACK, P.: '*Bobotoi* and *Sulu*—Melanesian Law: Normative Order or Way of Life?' *Journal de la Société des Océanistes* XLI (Juin 1985) No. 80, 15–23 and 'Melanesian Jurisprudence: A "Southern" Alternative' *Archiv für Rechts- und Sozialphilosophie: Supplementa* II, 1988, 91–101.

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Limitations of and Derogations from Human Rights in International Human Rights Instruments*

It is quite likely that all of you are aware of the present day Hungarian constitutional development, of the efforts in this country aimed at adopting a new constitution. These efforts for the time being cannot be qualified as a complete success story: you are probably informed also about the fact, that Hungary is actually the only country in this region (Central and Eastern Europe) which failed to adopt a new constitution following the transition to democracy. I have no intention of going into the details of this failure, not only because many are of the opinion that it is not a failure at all, but simply because in light of the subject of my contribution I have neither time, nor mandate of doing it.

In my contribution I intend to explore briefly a rather specific, relatively well-known and seemingly not very complex problem, namely, the problem of limitations and derogations from human rights on the basis of international human rights instruments. To be frank with you, when I agreed to participate in this meeting of ours I was not convinced at all that my contribution would lead to anything useful. Hopefully this is not the case, because when I started to examine the problem from the practical point of views, that is not simply from the point of normative regulations and formulations, but from the point of practical interpretation and application of the relevant limitations, I have encountered a plethora of challenging and not very simple issues. For those who

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participate in and are responsible for the drafting of the new Hungarian constitution this practice probably can provide some food for further thinking, can convey knowledge and understanding about strengths and weaknesses of law in solving those social problems to which it addresses itself.

The drafters of modern constitutions are not in a position to disregard this practice because the issue of the protection of human rights belongs no longer exclusively to the domestic jurisdiction of States. There is vast network of international human rights instruments, which are not just nice idealistic declarations, but contain specific and enforceable obligations. And on the part of the main actors of the international community, that is of States, there is an accepted consensus, that many of the related international obligations due to their importance for the whole international community are obligations in whose fulfillment all of them have a legal interest. The special nature of these obligations stems from the special nature and role of these instruments. This special character of international human rights instruments has been summarized very precisely by the Inter-American Court in one of its advisory opinions:

> "29. The Court must emphasize, however, that modern human rights treaties in general, and the American Convention in particular, are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the state of their nationality and all other contracting States. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other states, but towards all individuals within their jurisdiction."[1]

Hungary has ratified almost all of the major international human rights instruments, which have not only become part of the country's treaty system, but in the latest time the judicial bodies have started to apply them directly, like they apply other domestic acts. What is fascinating in this process is that these instruments and the related decisions of international organs dealing with their interpretation are being refferred to not only by the supreme judicial bodies (such as the Constitutional Court or the Supreme Court) but by the courts of first and second instance, too. Thus for example the Pest County Court (Pesti Központi Kerületi Bíróság) in its decision of April 24 1997 has not only stated that the UN Covenant on Civil, Political and Cultural Rights and the European Convention on Human Rights form an integral part of the Hungarian domestic

1 Inter-American Court Advisory Opinion OC-2/82 of September 24, 1982, "The Effect of Reservations on the Entry into Force of the American Convention", § 29.

legal system, but has rendered its judgement on basis of principles established by the Strasbourg Court.[2]

Following this short introductory remark I shall now to turn to the problem, which I would like to address briefly in this morning session.

International human rights instruments contain several types of limitations on the scope of the rights protected. It is necessary to point out, that though there is no generally accepted classification of these limitations, the possibility of their application is determined by two main factors: by the nature of the right enounciated and protected and by the nature of the situation in a given country at a given time (whether it is a normal one or an exceptional one, characterized as an emergency situation).

From the point of view of the nature of the rights protected one can make a distinction between the so-called absolute rights which contain entitlement or prohibition formulated in absolute terms, that is without any restriction or exclusion and rights the scope of which can be limited for reasons of general interests. There is a rather limited number of absolute rights, and their list is not completely identical in different instruments.[3]

A great number of rights and freedoms belong to those the scope of which on the basis of a specific procedure and for clearly established reasons can be limited or restricted.[4]

These limitations are either in-built limitations in the formulation of a right itself, or exist in the form of exceptions, that is in the form of express specification of those instances, which are not covered by a right.

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2 Pesti Központi Kerületi Bíróság, 29.P.87.533/1996/4.

3 Thus for example in the UN Covenant on Civil, Political and Cultural Rights in the list of these rights one can find such as the prohibition of torture, inhuman and degrading treatment (Article 7), prohibition of slavery and servitude (Article 8), prohibition of imprisonment on the ground of inability to fulfill a contractual obligation (Article 11), prohibition of retrospective effect of criminal law (Article 15), the right to the recognition as a person before the law (Article 16). The European Convention enounciates in such a way the following rights: prohibition of torture, inhuman and degrading treatment (Article 3), prohibiton of slavery and servitude (Article 4, § 1), prohibition of retrospective effect of criminal law (Article 7 § 1), prohibition to be tried in criminal proceedings for an offence which one has already been acquited or convinced (Article 4, Protocol No. 7), prohibition of deprivation of freedom merely on the ground of inability to fulfill a contractual obligation (Article 1, Protocol No. 4), prohibition to expel a person from the territory of the state of which he is national (Article 3, § 1, Protocol No. 4), the right of a person to enter the territory of a State of which he is a national (Article 4, Protocol No. 4), prohibition of collective expulsion of aliens (Article 4, Protocol No. 4). The American Convention on Human Rights lists the following rights: the right to recognition as a person before the law (Article 3), the right to physical, mental or moral integrity (Article 5, § 1), the prohibition of torture, inhuman and degrading treatment (Article 5, § 2), freedom from slavery and servitude (Article 6, § 1), freedom from ex post facto laws (Article 9), the right to compensation in case of miscarriage of justice (Article 10), the right to a name (Article 18), the right to equal protection by law (Article 24).

4 See, for example, Articles 9, 12, 14, 19, 21, 22 of the UN Covenant on Civil and Political Rights; Articles 8, 9, 10, 11 of the European Convention on Human Rights.

On the basis of the concept of derogation one can make a distinction between derogable and non-derogable rights. However, there is a clear difference between the notion of limitation of human rights and derogation from human rights, notwithstanding to the fact, that a derogation or a limitation seemingly might lead to the same end result (to the restriction of protected rights).

The concept of derogation from the point of public international law implies that apart from some rights, considered by member states of a particular treaty system as rights of great importance, states in exceptional, crisis-like situations can suspend or limit the enounciated rights and guarantees on temporary basis.[5] The aim of the concept of derogation is to secure overriding rights of the State for the protection of democratic institutions in cases when there is a serious threat to the nation. An act of derogation is always effectuated under the supervision of an international institution concerned about the measures of derogation, and this institution has the right to examine whether the measures taken are strictly required by the exigencies of the situation.

The existing practice of derogations shows that states have a relatively wide margin of appreciation in determining those situations when the "life of a nation" is threatened by public emergency. Thus for example, under Article 15 of the European Convention the United Kingdom, Ireland, Greece and Turkey have derogated from the conventional obligations when the respective goverments have percieved the existence of domestic terrorist activities.[6] The threat which necessitates the derogation, as I have pointed out already, should be a real one. The European Court of Human Rights in one of its first judgement[7] has defined this threat in the following: "an exceptional situation or crises of emergency which affects the whole population and constitutes a threat to the organized life of the community of which the State is composed."

It is necessary to point also, that the so-called absolute rights, that is rights formulated in absolute terms without any limitations should not be identified with non-derogable rights. A non-derogable right might have some in-built limitation[8] and an absolute right is not always listed among non-derogable rights.[9]

There is a few number of rights which are both absolute and non-derogable. These rights occupy a special position in the system of international protection, they to some extent can be viewed as rights, which are based on *ius cogens* obligations of states. It is rather difficult to specify exactly the list of these rights, but there is some consensus, that they are of elementary nature, constitute the foundation of the international community itself. One can find opinions that these rights include, for example, the right

5 See, for example, Article 4 of the UN Covenant, and Article 15 of the European Convention.

6 See the notices of derogation of the United Kingdom of 27 June 1957 and 28 December 1988; Ireland of 18 October 1976; Greece of 19 September 1967; Turkey of 23 August 1990.

7 Cf. Lawless case, Series A. No. 3, 56.

8 See, for example, Article 2 of the European Convention and Article 4 of the American Convention.

9 See, for example, Article 10 of the American Convention on the right to compensation in the event of miscarriage of justice and Article 24 on the right to equal protection; and also Articles 1, 3, 4, Protocol No. 4 of the European Convention.

to life, the prohibition of slavery and servitude, of torture and racial discrimination.[10] In the practice of international institutions interpreting human rights at least one of just mentioned rights, namely, the prohibition of torture has been undisputedly recognized as an obligation being of absolute and non-derogable nature. Thus, for example, the European Court in its judgements related to Article 3 of the European Convention has many times observed that this Article "enshrines one of the fundamental values of democratic society", and that "even in the most difficult of circumstances, such as the fight against organized terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment"; this Article "makes no provision for exceptions and no derogation from it is permissible ... even in the event of public emergency threatening the life of a nation".[11]

The practice of some international judicial bodies, inter alia the European Court's practice, provides a very interesting exercise to all those, who wish to have a closer look at the problem of limitations. The Strasbourg Court has established a well-developed set of principles related to the problem. It proceeds with the examination of any limitation in the following manner.

As a first step it usually starts with the examination whether there was an interference (limitation) with the individual's right to respect for his or hers particular right. If it establishes that there was an interference, then it proceeds with the clarification whether this interference was justified. The examination of justification includes three types of scrutiny.

1) The first type of scrutiny is related to the establishment whether the interference (limitation) was "in accordance with law" or was it "prescribed by law". The notion "in accordance with law" does not mean that a limitation could only be based on an act of a supreme legislative body. Regulations of lower bodies, which due to the delegation of power have been invested with the right of rule-making, may be regarded as law. It is not the form but the quality of a regulation what matters in the Strasbourg practice. This quality is presumed, if a norm is adequatly accessible and forseeable: "a norm cannot be regarded as law unless it is formulated with sufficient precesion to enable the citizen to regulate his conduct".[12]

2) The second type of scrutiny is whether the limitation had a legitimate aim. During this examination the Court rules on whether a limitation was based on the grounds enumerated in the relevant provisions of the Convention (these grounds for example include national security interests, protection of morals and public health, prevention of disorder and crime, protection of economic welfare of the country).

10 Cf. International dimensions of human rights. Vol. 1. Paris, 1982. 44–48.

11 Aksoy case, judgement of 18 December 1996, § 62.

12 Silver and others case, Series A. No. 61, 33–34.

3) The third type of scrutiny relates to the issue whether the restriction was necessary in a democratic society. This is a very interesting type of scrutiny, because the notion "necessary in a democratic society" occupies a prominent place in the whole process of interpretation,[13] and its application produces quite unpredictible results for the member states. This notion at the beginning was used and interpreted with the aim of providing some maneuvering possibilities (that is some sort of discretion or margin of appreciation) for national authorities in the domain of limitations. However, it has become a notion independent from national legal systems, it functions as a limitation of limitations, as a supreme controlling standard, on the basis of which the Strasbourg Court is entitled to determine the scope of national discretion in the domain of limitation of rights. In other words, even in cases when a restriction is prescribed by law, and when it has a legitimate aim, the Strasbourg Court—on the basis of its own perception of what is necessary and what is not necessary in a democratic society—can establish the incompatibility of a particular restrictive measure with the Convention. According to the Court's practice, the essential content of the notion means, that a restriction or a limitation should always correspond to a "pressing social need", and it should be proportionate to the legitmate aim persued.[14]

With the aim of presenting the problem of limitations in a more visible manner, more concretly I have randomly selected two recent cases from the practice of the Strasbourg Court, which relate also to rights formulated in the Hungarian concept of the new constitution. The first case deals with the problem of non-discrimination and equality (Article 21 of the Draft), and the second one concerns the protection of private life (Article 26 of the Draft).

Article 21 (§ 3) of the Draft establishes a possibility of differentiation between the rights of Hungarian and non-Hungarian nationals without any kind of qualification. This possibility in light of the provisions of the European Convention is not an unlimited possibility. The facts of the first case[15] can be briefly summarized as follows. The case was reffered to the Strasbourg Court by a Turkish national, who lived and worked in Austria from 1973 until 1987. From 1986 he was provided with unemployment benefit (paid to him as an advance of his retirement pension), however, his entitlement to unemployment benefit has expired in 1987, following which he applied for an emergency assistance. Emergency assistance according to the Austrian law was an assistance paid to persons who were no longer entitled to unemployment benefit, in order to quarantee a minimum income. The competent Austrian Employment Agency rejected his claim to an emergency assistance on the ground that he did not have an Austrian nationality. The Austrian Unemployment Insurance Act of 1977 (then in force) contained a special provision, which stated that unemployed persons who have

13 The Court in several of its decisions stated clearly, that its "supervisory functions oblige it to pay the utmost attention to the principles characterising a 'democratic society'". Handyside case, Series A. No. 24, 22.

14 See, Laskey and others case, Judgement of 19 February 1997, § 42.

15 Cf. the case of Gaygusuz v. Austria, Judgement of 16 September 1996.

exhausted their entitlement to unemployment benefit may be granted an emergency assistance, provided that the person concerned has an Austrian nationality. This Turkish national in his complaint addressed to the Strasbourg Court claimed, that the Austrian authorities' refusal to grant him emergency assistance on the ground, that he did not have Austrian nationality, was a discrimination based on national origin, and as a result this fact violated his rights under Article 14 in conjunction with Article 1 Protocol No. 1 (the right to the protection of possessions). The Court in Strasbourg has stated that the entitlement to this social benefit (considering the fact of the payment of contributions by the applicant to the unemployment insurance fund while he was working) is of pecuniary nature and therefore fell under the provisions of Article 1 Protocol 1. It established also, that there had been a breach of the non-discrimination clause of the European Convention in conjunction with the above-mentioned Article. The Court pointed out in its judgement, that "Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. However, very weighty reasons would have to put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention".[16]

The other case relates to an interference into private life with the aim of protecting morals.[17] By the way, here I would like to point out, that the text of the Hungarian Draft does not contain any reference to such a ground of restriction as the protection of morals. The circumstances of the second case are as follows. In the course of routine investigations into other matters, the police in the U.K. came into possession of a number of video films made during sado-masochistic encounters, involving the applicants and a large number of other homosexual men. These sado-masochistic acts took place in private houses, in rooms equipped as torture chambers, and were carried out in forms of extreme cruelty, including instances of branding and infliction of injuries, which resulted in the flow of blood. These acts were conducted in private by adult persons, on consensual basis. Video cameras were used to record events, but the tapes copied were distributed only among members of the group. There was a criminal proceeding against the applicants, who were convicted and sentenced to different terms of imprisonment. Those who were convicted brought the case before the Strasbourg Court. They complained that there was an unlawful and unjustifiable interference with their right to respect for their private life. They alleged, that these activities formed part of their private morality, were an intimate aspect of their private life, which should be viewed as matters of sexual expression, rather than violance. Moreover, the participants were willing adult participants, the acts were not witnessed by the public at large, no serious and permanent injury had been sustained, no infection had been caused. The Government, on the other hand, insisted, that the State was entitled to punish acts of such violance (which could not be considered of a trifling nature) irrespective of the

16 See, ibid. § 42 of the judgement.

17 See, the judgement referred to in note 14.

consent of the victim, and in addition it was entitled to prohibit such activities on grounds of broader moral reasons. The Strasbourg Court has agreed with the Government's arguments and has not established the violation of Article 8 of the Convention. In its judgement it pointed out, that a State is entitled to regulate (including the means of criminal law also) activities, which involve the infliction of physical harm, even in instances when these activities occur in the course of sexual conduct. In other words, not everything that happens behind close doors and on the basis of a consent should be accepted and tolerated from the points of public morality and public health.

Had there been a little much more time, it might have been appropriate to reflect in more detail on those issues of the new Hungarian Draft, which according to my opinion, seem to be rather strange in light of provisions of international human rights instruments. Firstly, I would like to point out, that it does not contain a real *habeas corpus* clause. Secondly, Article 35 of the Draft, which deals with the principle of fair trial, does not contain any reference to such an important element of this principle as the right to public hearing. Thirdly, the restrictions of the rights of civil servants and other classes of public servants are very widely formulated. These restrictions are destined for application due to the mere fact of belonging to a particular class of profession, what can hardly been deemed as a satisfactory solution. One can mention also some other vague provisions of the Hungarian Draft, but I think that I have already exhausted the alloted time limit, hence I would like to stop at this point and to thank you for your attention.

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Law as a Normative Order: a Comparative Study of British and Continental Traditions in Legal Theory

Much of contemporary British legal theory has its roots in the tradition of philosophical empiricism, the philosophical position that no theory or opinion can be accepted as valid unless verified by the test of experience. In this context normativity, both in law and morals, is understood and explained in terms of social practices observable in the world. The 19th century British jurist John Austin, for example, defined law in terms of a command backed by a sanction and as presupposing the habitual obedience of the bulk of a community to the commands of a sovereign himself not habitually obedient to anyone else.[1] Similarly, Professor Hart's conception of legal obligation, although somewhat more complex, came, in the final analysis, from the observation of people's actual practices analysed in terms of "the internal point of view" crucial to their comprehension of and participation to these practices.[2] It is within this framework that we must consider the distinction, so essential to positivist jurisprudence, between "is" and "ought", as adopted by British positivist theorists. And it is here that a chief difference between the British and the Continental traditions in legal theory lies. The aim of this paper is to re-examine some of the main themes of positivist jurisprudence and explore the extent to which modern theorists, both British and Continental, have

1 AUSTIN, J.: *The Province of Jurisprudence Determined*, The Noonday Press, New York, 1954 (first published in 1832).

2 HART, H. L. A.: *The Concept of Law*, Clarendon Press, Oxford, 1961 (2nd revised ed. 1994).

succeeded in developing a theory of law that would make for a workable marriage between the two traditions.

The continental understanding of the distinction between *is* and *ought* is based upon the Kantian distinction between the phenomenal world, the province of the *is*, and the world of the right wherein the categorical imperative reigns, the province of the *ought*. According to Hans Kelsen, we can look at the world around us in two distinct ways. We can explain it in scientific terms and through scientific laws in which case we are in the domain of the *is* where the mode of explanation is causal. We can also look at the world in normative terms and if we do this we are in the domain of the *ought* wherein the mode of explanation is no longer causal but imputational. There is no logical connection between these two ways of looking at the world and so we cannot employ methods appropriate to one domain to interpret the other. An act in the world is a natural event which is the subject of causality. This is properly the subject of the natural sciences, in which Kelsen includes sociology, psychology etc. Explanations of the type if A happens then B will follow are appropriate here. Normative science, on the other hand, seeks to discover the *meaning* of a natural act. In this respect, explanations are organised under the principle of *imputation*; i.e. if A is the case then B ought to be (e.g. if the traffic light glows red then the cars ought to stop). Kelsen regards legal science as a *normative science:* a science which constitutes knowledge of a normative order. Normative science is not concerned with causal messages but rather with representations of that which ought to be done, for example, according to positive law. What precludes the propositions of normative science from becoming entirely prescriptive judgements is their being made from a "hypothetical" viewpoint—Kelsen's basic norm—introduced solely for the purposes of normative science.[3] From this point of view, the norm—which in the law is a direction to officials to apply sanctions if someone does something which is forbidden—is a scheme of interpretation in that it enables us to give meaning to a natural causal act. So, Kelsen recognises that law is something that sets a standard of conduct (i.e. its nature is normative or prescriptive), but he denies that law owes its normative quality to social practice. Kelsen denies, in other words, that the standard of behaviour rests in some way on the regularity of behaviour (as Austin and Hart argue). For him, the sociology of law is a possible mode of explanation but it cannot be seen as normative science for "cognition in legal sociology is not concerned with the legal norm *qua* specific meaning; rather, it is directed to certain events quite apart from their connection to norms that are recognised or presupposed as valid. Legal sociology does not relate the material facts in question to valid norms; rather, it relates these material facts to still other material facts as causes and effects."[4]

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3 See on this RAZ, J.: The Authority of Law, Clarendon Press, Oxford, 1979, ch. 7. For a critical discussion of Raz's views see: A. WILSON: 'Joseph Raz on Kelsen's Basic Norm', *American Journal of Jurisprudence* 27, 1982, 46.

4 KELSEN, H.: *Introduction to the Problems of Legal Theory* (transl. by Paulson, B. L.—Paulson, S. L.), Clarendon Press, Oxford, 1992 (first published in 1934), 13.

According to Kelsen, a particular legal provision has an objective character because it is placed in the context of a legal system. We can trace the legal provision up the chain of validity until we can get no further. In Kelsen's terms, we arrive at the historically first constitution. But how do we know if that is valid? Kelsen answers this question by considering whether the behaviour of the first Parliament can be interpreted as having the objective meaning of law-making behaviour. Here we have to *presuppose* that what the members of that Parliament meant by their activity was some form of law-making behaviour. It is only if we assume this basic norm that we can say that norms created in the system have an objective validity. In other words, we can interpret a social order legally only if we presuppose a basic norm—or *grundnorm*—which says that the meaning of the historically first constitution is to be understood as implying that all acts made under it should be treated as valid.

In the British tradition the distinction between *is* and *ought* is associated with the famous passage of the 18th century philosopher David Hume in which he denies the possibility of deriving moral premises from statements of fact.[5] In the context of this tradition the is/ought distinction adverts to the possibility of critical and censorial comment on the law but appears to lack any deep epistemological qualities. In this respect the critical evaluation of the law comes, in the final analysis, from one's moral premises, whatever these may be based on, but does not affect what the law actually is. According to Jeremy Bentham one could divide jurisprudence into two distinct areas, an area where one stated the law as it is and an area where one looked at the law as it ought to be. Indeed, for Bentham the distinction between law as it is and law as it ought to be is a necessary condition for the sound appraisal and intelligent reform of positive law.[6] This way of looking at the matter boils down to an assertion of the difference between law and morality and that while morality can provide the basis for the critical evaluation of the law there is no necessary connection between the two. The Continental approach, by contrast, does not rule out the necessary connection of law and morality for it views both as normative systems inhabiting the world of the *ought*. Moreover, according to Kelsen and others in the continental tradition, an adherence to legal positivism implies a non-cognitivist theory of ethics, one which holds that ethics is not a matter of knowledge but of attitude. From this viewpoint it is said that, in moral reasoning there can be no rational solutions as we cannot "objectively" know what is right or wrong. Some have argued that the British tradition, if it is to be seen as positivist, must also imply the same. However, neither Bentham nor Austin seem to accept that moral judgements are inherently arbitrary. Although they are both seen as committed positivists and upholders of the distinction between positive jurisprudence and critical jurisprudence, they both proceed from what may be described as a cognitivist theory of ethics, namely utilitarianism.

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5 *A Treatise of Human Nature*, University Press, Oxford, 1978 (first published in 1740), bk. III, I, 469.

6 BENTHAM, J.: *Of Laws in General* (ed. H. L. A. HART), Athlone Press, London, 1970.

For Hart and his followers the British empiricist approach rests upon understanding what makes practices in the world rules of obligation. This question is answered by first of all showing how the idea of habits, relied on by Bentham and Austin, relating as they do to observed regularities of external behaviour cannot offer an adequate explanation of the notion of rules. To understand the normativity of rules we need to reflect upon the human attitude to the things people do as a rule. In Hart's words:

> [I]f a social rule is to exist some at least must look upon the behaviour in question as a general standard to be followed by the group as a whole. A social rule has an "internal" aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behaviour which an observer could record.[7]

Hart rejects the idea that rules are phenomena that have to do merely with an externally observable habit of obedience. Instead, he calls our attention to the social dimension of rules, in other words, to the way in which members of society perceive the rules and their internal stance or attitude towards the rules. If we want to understand the nature of rules we need to look at them from the point of view of those who "experience" them. It is this internal aspect that distinguishes a social rule from a mere habit. One may go even further and say that accepting a rule involves not only a belief that there is a good reason to comply with it but also a commitment to the values which the rule reflects.[8] From this viewpoint deviation is seen as conduct which is open to criticism and that criticism is considered justified or legitimate.

Hart tells us that in a primitive society there are only obligation-imposing primary rules, i.e. rules prohibiting forms of conduct to which human beings are tempted by nature (the use of violence, theft, deception) but which they must repress if they are to live together in society. In such a society no clear distinction is drawn between morality and law. But, as society becomes more complex, there may develop dispute-settling procedures and out of them institutionalised systems for this, with enforcement procedures and institutions for authoritatively making decisions. As society progresses, certain activities can and do become socially and morally institutionalised; but some of them, as in the case of contract, for example, can become yet further institutionalised by being brought within the sphere of adjudication—the sphere of judicial institutions. We might say, then, that moral rules and legal rules are the same thing but that legal rules are to be seen as doubly institutionalised. In the process of the institutionalisation of certain rules as legal rules it is of course possible that they will diverge from the morality of various groups in society and so it can become a question why or whether people should morally obey the rules laid down by the institutions of positive law.[9] In

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7 HART: supra note 2, 55.

8 See DUFF, R. A.: "Legal Obligation and the Moral Nature of Law", *Juridical Review*, 1980, 61.

9 HART: supra note 2, ch. 5.

other words, law is separated from morality by its special institutionalisation. But the way that this institutionalisation takes place rests, according to Hart, on a social practice which does not need to involve more than a small group of people namely those whom Hart calls the "officials of the system". For Hart the validity of the secondary rules, as well as that of the rule of recognition, depend on the fact that they are accepted by the officials of the system "from the internal point of view".[10] Although Hart lays emphasis on the fact that the law is to be seen from the internal point of view and not as based on naked command, it is the normative practice (with the internal point of view) of the officials that constitutes the legal system, nothing more being required as to the rest of the community than its members habitually obey. So the practice which in Hart's theory accounts for a rule of recognition is only distinguishable from morality by its institutionalisation as a rule of law. But what does "institutionalisation" mean here and how can the nature of legal rules be explained on this basis?

To gain some insight into this matter it is necessary to consider, briefly, John Searle's theory of "institutional facts". According to Searle there are some entities in the world which seem to exist wholly independently of human institutions, and he calls these "brute facts". Their existence is, or seems to be, in no way dependent on our will, nor do they result from our practices and contrivances. Other entities, by contrast, do not seem to exist in this way. Take a goal in a football match for example. If someone asks me what that is, I cannot point to anything in the material world that I can specify as a goal. I cannot point to a ball crossing the line and say, "that is what I mean by a goal". And yet I can intelligibly talk of there being such a thing as a goal. According to Searle, these facts may be called institutional facts for, as he explains

> [They] are indeed facts; but their existence, unlike the existence of brute facts, presupposes the existence of certain human institutions. It is only given the institution of marriage that certain forms of behaviour constitute Mr Smith's marrying Miss Jones. Similarly, it is only given the institution of baseball that certain movements by certain men constitute the Dodgers beating the Giants 3 to 2 innings. Even at a simpler level, it is only given the institution of money that I now have a 5 dollar bill in my hand. Take away the institution and all I have is a piece of paper with various green and gray markings.[11]

Legal entities appear to exist and behave in a way not different from our goal in a football match. For example, every time I board a bus a contract is made between me and the bus company but I cannot point to it in the material world. I cannot point to myself getting on the bus and buying the ticket and say "that is the contract". And yet I can, and legal practitioners do all the time, talk intelligibly of a contract. To say that

10 Ibid. 109 ff.

11 SEARLE, J. R.: *Speech Acts*, University Press, Cambridge, 1969, 51. And see ANSCOMBE, G. E. M.: "On Brute Facts", *Analysis* 18, 1957–58.

a contract exists presupposes taking a particular view of a particular relation between two people, namely that which is set within the frame of reference of certain organised groups of people, the legal profession, judges, enforcement agents etc. From this point of view it is possible to say what the "institution" itself is.

It is on this basis that Professors Neil MacCormick and Ota Weinberger developed the theory of *Law as Institutional Fact*. According to MacCormick, there are three types of rules which shape our use of legal institutions, such as wills, trusts, contracts etc.: (a) "institutive rules", i.e. separate rules of law prescribing the conditions which are vital to the existence of an instance of any such institution; (b) "consequential rules", i.e. the set of rules which specify the consequences, in the form of rights, liabilities, powers and duties which arise from the setting up of an instance of any such institution; (c) "terminative rules", i.e. rules providing for the termination of instances of institutions at a particular point of time. In this respect the term "institution of law" denotes those legal concepts which are organised on the basis of institutive, consequential and terminative rules, with the effect that instances of them are properly said to exist over a period of time, from the occurrence of an institutive act or event until the occurrence of a terminative act or event.[12] Further, a distinction must be drawn between the institution itself and instances of the institution—there is a difference between the institution of marriage and a marriage. The existence of an institution as such is relative to a given legal system, and depends upon whether or not that system contains the appropriate institutive, consequential and terminative rules. If it does, then the taking place of given events or the carrying out of given acts has on the basis of the rules the effect of giving rise to an instance of the institution. What makes the institutional theory of law particularly interesting is that it is the product of a joint effort of two theorists, the British Neil MacCormick and the Austrian Ota Weinberger, who are seen as representatives of different traditions in legal philosophy. MacCormick represents the British school; Weinberger speaks for the Continental one. In what follows, we will consider whether the institutional theory of law makes for a workable marriage between the British and continental traditions in legal theory.

As was said before, from a British perspective, the only thing that differentiates legal from moral and other rules is their special institutionalisation and this presupposes some rules of the appropriate "institutive" type. Although it is generally assumed that all valid legal acts necessarily presuppose some rule which is constitutive of the act as an act in the law, or which confers the power exercised by doing the act in question, not all legal rules can be seen as resulting from acts of this kind, for that would lead to an unacceptable *regressus ad infinitum*. At the highest level there must be some rules which are capable of being accounted for independently. But what are these rules and what is their ontological status? On this point there appears to be a clear difference between the British empiricist tradition and the Continental, Kantian, tradition. From the

12 MacCORMICK, N.—WEINBERGER, O.: *An Institutional Theory of Law*, D. Reidel Publishing Co., Dordrecht, 1986, 66.

viewpoint of the latter tradition there is more to normativity than the British empiricist approach allows for. Let me explain. Hart, in describing the "rule of recognition", says that the practice—with the internal aspect—whereby judges recognise rules as legally binding on themselves and others is all you need. He then goes on to criticise Kelsen's conception of the hypothetical—"presupposed but not posited"—basic norm in the following way. He invites us to consider, as an example, the standard metre bar in Paris. The standard metre bar defines the metre. In so far as it constitutes what a metre is, what is the point in asking if that is valid? In the same way one may say that the historically first constitution, Hart's ultimate rule of recognition, defines what valid law is. Since it constitutes law what is the point in asking whether it itself is valid? In Hart's words:

> We only need the word "validity", and commonly only use it, to answer questions which arise *within* a system of rules where the status of a rule as a member of the system depends on its satisfying certain criteria provided by the rule of recognition. No such question can arise as to the validity of the very rule of recognition which provides the criteria; it can neither be valid nor invalid but is simply accepted as appropriate for use in this way. To express this simple fact by saying darkly that its validity is "assumed but cannot be demonstrated", is like saying that we assume, but can never demonstrate, that the standard metre bar in Paris which is the ultimate test of the correctness of all measurement in metres, is itself correct.[13]

A reply to this argument would be, using Hart's metre bar example, the following. Although the metre bar defines and constitutes a metre we can still ask the sensible question, ought we or anyone else to use this as a unit of measurement? To put it in more general terms, of every practice we can still ask the sensible question, ought it to be continued? Kelsen and others following the Continental, Kantian, tradition deny that any social practice is itself constitutive of an "*ought*". From this viewpoint the transition to the "*ought*" is seen as a transition into another sphere of thought. Does Weinberger subscribe to this, too? According to him we can speak of the reality of ideal or thought objects, such as the norm, but there is also a connection between it and material existence. This connection has two types: (a) observable proceedings which can be characterised according to their ideal content; (b) such observable relations as make it possible to put temporal coordinates to observable actions. Weinberger then sets down the relations which appear to reflect the existence of the norm. Here we find diverse institutions, including the state, whose existence is associated with norms; the collective consciousness of the citizens; the efficiency of norms as determinative of conduct; the consequences of punishment or reward which provide further motivation for acting according to the norm; through the way in which our behaviour, even though we are

13 HART: supra note 2, 105–106.

unaware of it, is determined by norms and institutions of a normative nature. In Weinberger's words:

> Institutional facts—like, for example, the legal system—are in a peculiar way complex facts: *they are meaningful normative constructs and at the same time they exist as elements of social reality.* They can only be recognised when understood as normative mental constructs and at the same time conceived of as constituent parts of social reality. As a meaningful normative construct, the law is the object of hermeneutic analysis. The real existence of the legal system is conditioned by a multitude of different circumstances: the law exists in the consciousness of people, meshes in with interconnections of behaviour-patterns and expectations, has standing relationships towards social institutions and observable events.[14]

Although this way of looking at the issue introduces a connection between the norm and the material world that perhaps Kelsen had not envisaged, it still appears to be quite difficult to say that it is compatible with the British tradition that Hart and MacCormick are seen as representing. For Weinberger is looking at these facts in the material world as evidence of a norm which is still in another mode of reality while for the British "rule" tradition many of the empirical signs that were mentioned above would be taken as constituting the norm and not as merely evidence for it. The British side of the *Institutional Theory of Law* adopts a much more sociological approach and continues to view the is/ought distinction as one concerning the difference between critical and positive jurisprudence, as propounded by Bentham, rather than the Kantian difference between two modes of existence. What we have here, according to the British view, is ultimately a theory of moral rules which depends upon cognition, upon seeing what people actually do in the world; from this viewpoint, critical jurisprudence depends upon taking one set of practices against another legally institutionalised set. The British, Hartian, position is that the concept of validity is applicable only within the context of the rule of recognition;[15] on the other hand, Kelsen's idea of prescriptive bindingness is applicable quite apart from such context for the ontological theory he proposes places the norm in a different, logically unconnected world. Weinberger's thesis, though it seems to depart from the pure logic of Kelsen's position, still treats norm and practice as being located in distinct, though in some vague way connected one to another, domains. On the other hand, MacCormick, though he talks of the distinct ontological status of the norm, does not appear to depart from the practice approach. According to him

> [The] approach which says that laws are actual existent features of human societies, available for hermeneutic understanding and description, is one which

14 MacCORMICK–WEINBERGER, supra note 12, 113.

15 HART: supra note 2, 105.

> preserves for the jurist the position also of moral critic. What laws exist, here there or anywhere, is determinable by reference to criteria of validity set within this, that or the next system. What laws *ought* to exist is a question of critical morality. ... To be a so-called positivist in this mould is not to assert the superiority of law to moral considerations nor to treat it as a morally indifferent phenomenon. Rather, it is to present law as a form of social practice or social institution which has to be subjected to a permanent moral critique...[16]

What is the connection between the two approaches then? It is to that question that this discussion must now turn.

According to the British approach, law and morality are both forms of positive morality which, we may add, can be judged from the point of view of an ontologically different morality. It is here we can see how the two traditions that I have been talking about fit together. There are practices with the internal, critical reflective point of view which constitute law and morality. But there is also a moral point of view which can be applied critically to these practices. Now this moral point of view might ontologically be said to belong to the Kantian world of the "ought" and might also be regarded as a pure distillation of the critical reflective attitude. Indeed in his critical morality Hart seems to recognise that morality would be inconceivable without taking into account certain factors, such as internal coherence, universalibility etc. This argument has some of the aspects of the Kantian transcendental argument that these elements are necessary because they are presupposed by both our positive morality and our law. One might compare this "transcendental presupposition" to Professor Lon Fuller's conception of the "inner morality of law".[17] Although Hart criticised Fuller's approach on the grounds that the "inner morality of law" represent nothing more than the rules for efficiency, his more critical moral thinking seems to imply that there is more to it than that and that this presupposition of "legality" is one that the officials ought to have or, as a matter of historical fact, do have.

What has been said suggests that law can only be seen as another practice, a form of positive morality, whose moral point of view is what we call legality. It is legality that appears to be the most likely meeting ground of the two traditions I have been talking about. The concept of legality is best expressed in the form of a series of maxims such as: all persons are equal before the law; the courts of justice are open to all; criminal laws do not apply to punish acts done before their introduction (the principle of non-retroactivity); criminal offences should be clearly defined and labelled (the principle of maximum certainty). As we can see, legality sets a great premium on legal certainty, the knowledge that there is a fair and just procedure for applying a general rule to a particular case.

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16 MacCORMICK–WEINBERGER, supra note 12, 138–139.

17 FULLER, L.: *The Morality of Law*, Yale University Press, New Haven, 1969 (first published in 1964). Yale University Press, 1969.

However, rules cannot, by themselves, determine all possible outcomes since there is a limit to the guidance general language can provide. We cannot frame a rule which will cover all possible outcomes definitely. If, to counter this, we frame a very vague rule then how are we to know that it applies to the particular case? If, in answer, we reason purposively and determine the meaning of a rule from its purpose or intention and not by what it literally says, then how can we tell, in any rational and objective way, what the purpose of any particular rule is and thus recover the intersubjectivity that legality tried to bring us? One way is to view the system as a whole and allow determinations which have a coherent "fit" with the whole system. This way of achieving objectivity places a stress on the role of the judicial personnel, those who work in the system continually. The emphasis here is on the professionalism and the professional skills of the judiciary. So, in practice, the liberal ideal of "government of laws and not men" becomes the government of a small group. Here we can see the contradiction in a liberal democracy based on the rule of law. For in order that the main moral imperative of that society, "the government of laws and not of men", flourish, another important value, that of participation must, in part, be negated. One can see this in the tension between efficiency and democracy where efficiency, in the shape of speed, reliability and constancy, is seen as continually subverted by the demands of democratic, and therefore inefficient participation.

The problem regarding democracy may be tackled by looking at ways in which we can make judicial decisions more rational. According to Ronald Dworkin, the fact that judges violate the principle of democracy does not matter if there can be said to be a right answer.[18] But we do not have to adopt such an extreme solution for rationality is not a final end. It is a basis of our practical reasoning but nevertheless what we think of as acceptable discourses of practical reasoning depends also upon our views as to what is right and practical. We cannot just study rationality in the philosophical abstract without considering how discourses fit into society, the relations between different discourses and what their effect on the future development of society may be. Only on this basis we can look for choices as to what are acceptable forms of life and law and that, certainly, is the point of legal science.

18 DWORKIN, R.: *Law's Empire*, Fontana Press, London, 1986.

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The ILA Draft Instruments on the Protection of the Environment from Damage Caused by Space Debris

At the beginning of our century non-governmental international organizations had a great role in laying the foundation and development of air law.[1] The same can be stated for international space law too. The International Law Association at its Dubrovnik Conference in 1956 entrusted its Air Law Commitee to study the nature and contents of air sovereignty devoting special attention to the future problems relating to space-flights and the nature of interplanetary space. The answer to this question was formulated in an unanimously adopted resolution on the legal regime of outer space at the Hamburg Conference of ILA in 1960: "outer space may not be subject to the sovereignty or other exclusive rights of any state"—a principle which today is a generally accepted basis of treaty and customary law of space activities.[2]

International non-govermental organizations together with *certain* national scientific institutions in the following post-sateilite years have been granted a productive backing for lawmaking in this new sphere of international law. This may be said on the role of experts of space law science representing their countries in preparing treaties and conventions at interstate level.

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1 Institut de Droit International "with the aim of furthering international law" Neuchâtel 1900, Paris 1910. The International Law Association discussed air law at its Paris Conference 1912. See: MATTE, N. M.: *Treatise on Air-Aeronautical Law*, Montreal–Toronto, 1981, 80–83.; GÁL, Gy.: Space Law, Leyden-Dobbs Ferry, 1969, 49–52.

2 ILA report 1960, 267–268.

For the time being space activity is no matter of saving face, no fighting for the "firsts" among leading space powers anymore. If there is a competition, it is going on among highly commercialized national organizations dictated by requirements of market economy. It could be supposed that this development woulg grant favourable conditions for the progressive widening of the so-called *corpus iuris spatialis*. Unfortunately at least at interstate level it cannot be stated. On the other hand, non-governmental studies gave birth to very remarkable drafts such as the *Draft Convention on Manned Space Flight*[3] and the ILA *Draft Instrument on the Protection of the Environment from Damage caused by Space Debris.*[4]

Foregoing events

The Space Law Resolution adopted at the 63rd Conference of ILA (Warsaw 1988) called upon the International Space Law Committee "to elaborate principles and guidelines on debris and pollution arising from activities in outer space".[5] The Committee worked on the subject under the directive of Professor *Maureen Williams* as rapporteur and under chairmanship of Professor Karl-Heinz Böckstiegel.[6]

Legal question of environmental risks also were discussed at various international colloquia. Among others at an interdisciplinary meeting of scientists and lawyers in May 1988 organized by Professor Karl-Heinz Böckstiegel at the occasion of the 600th anniversary of *Cologne* University. The material of the discussions was published in the Studies in Air and Space Law of the Cologne Institute.[7] Specific meetings of experts on legal problems of space debris were held in *Buenos Aires* (1987) and *Assuncion del Paraguay* (1988). The Institute of Space Law repeatedly dealth with problems of space environmental protection including legal aspects of debris.[8]

ILA itself has been involved in the study of the problem for 8 years through reports of the Space Law Committee to the conferences. The Committee finally submitted in August 1994 to the Buenos Aires Conference a draft convention which—as the first concrete proposal for an instrument on space debris—was adopted unanimously by the Conference. The Resolution relating to the subject requested the Secretary General "to communicate the International Instrument together with the Report of the Committee to CUPOUS and to other appropriate governmental and non-governmental institutions for

3 Draft for a Convention on Manned space Flight (BÖCKSTIEGEL, K.-H.—VERESHCHETIN, V.—GOROVE, S.), Zeitschrift für Luft- und Weltraumrecht 40. Jg. 1991, 3–8; See: Commentary by the author in: proceedings of the 36. Colloquium on the Law of Outer Space, Graz, 1993, 272–285.

4 ZLW 43. Jg. 1994, 395–400.

5 ILA Report 1990, 154.

6 The work was supported by scientific consultants: Prof. L. Perek, Prof. D. Rex, Prof. H. A. Ricciardi.

7 Environmental Aspects of Activities in Outer Space. State of the Law and Measures of Protection. Studies in Air Space law, Vol. 9. Köln–Bonn–Berlin–München, 1990.

8 See: Proccedings 30. Coll. Brighton 1987, 121–191, Proceedings 32. Coll. Malaga, 1989, 59–203.

further consideration and action". The Committee was requested to continue its work and to promote "the adoption of rules of international law regarding space debris".[9]

Environmental protection and debris

Following the mandate contained in the Warsaw Resolution the Space Law Committee prepared and circulated a questionnaire to members of the Committee. Concerning debris the question were:

What is the meaning of contamination in Article IX of the Space Treaty of 1967. Does it include both debris and pollution?—Does the responsibility of states under Article VI Space Treaty cower space debris and pollution?—Does damage in Article VII of the Space Treaty and in Article I of Liability Convention cover the effects of space debris and pollution?—Does the term "space object" in Article I d. of the Liability Convention include also space debris?—Are these rules in international law applicable to the reduction of already existing space debris and pollution?[10]

The answers to above questions were instrumental in clarification of the present state of law and the requirements of new legal measures *de lege ferenda.*

What is this present state of law?

The meagre regulation of space environmental protection in the Space Treaty (Article IX) contains two obligations and two postulates.[11]

— In the exploration and use of outer space states shall be guided by the principle of cooperation and mutual assistance and shall conduct all their activities in outer space *with due regard to the corresponding interests of all other States Parties to the Treaty.*

— States Parties to the Treaty pursue studies of outer space and conduct exploration so as to avoid the harmful contamination and adverse changes in the environment of the Earth resulting from the introduction of extraterrestrial matter, and where necessary, shall adopt appropriate measures for this purpose.

Not more than postulates may be understood two rules of this *lex imperfecta* of environmental protection in outer space:

— If a State Party to the Treaty *has reason to believe that* an activity or experiment planned by it or its nationals in outer space would cause potentially harmful interference with activities of other States Parties in the peaceful exploration and use of outer space, it shall take appropriate consultations before proceeding with any such activity and experiment.

— A State Party to the Treaty which has reason to believe that an activity or experiment planned by another State Party in outer space would cause potentially

9 ZLW note 4., 396.

10 ILA Report 1990, 156–170.

11 GÁL, Gy.: Treaty Law Problems of Space Environmental Protection: De Lege Ferenda. *Tasks for International Legislation*, Note 7, 288–289.

harmful interference with activities in the peaceful exploration and use of outer space may request consultation concerning the activity or experiment.

Both obligations and postulates can be deducted from general clauses of the Space Treaty:

— The exploration and use of outer space shall be carried out for the benefit and in the interest of all countries and shall be the *province of mankind.*

— There shall be freedom of *scientific investigation* in outer space.

— Outer space shall be *free for exploration and use* by all states without discrimination of any kind on a basis of equality and in accordance with international law.

De lege lata the question emerges: do these obligations and postulates apply *eo ipso* to debris?

Contamination and debris

The answer depends on the meaning of this word "debris" which by silent consent entered into the space law terminology.

In the literature we meet often the statement of Professor C. O. Christol: "debris" is popular rather than a legal term. He is right, in space law instruments we do not find it. For the lexical meaning he would name debris "something that possesses tangible physical characteristics of the kind that can be seen touches, weighed and processed in factories or analyzed in laboratories. As a physical substance it may consist of a space object including its component parts are it may be composed of those fragments that or located in space".[12] In encyclopedic dictionaries we find definitions accentuating this later element: "scattered broken pieces, rubbish, wreckage, junk—anything regarded as of little value"[13] or "the remnants of something broken to pieces".[14]

Etymologically the term goes back to the French "debriser"—break down. Debris is therefore a "fragment d'un objet brisé, ou un partie détruit".[15]

Question Nr. 1 of the circular letter of the ILA Space Law Committee, referred to above, concerned the relation between contamination and debris, asking: the term "contamination", does include both debris and pollution?

The answers—differently motivated—were mostly affirmative: Pollution has a broader meaning including both material and immaterial pollution (*M. Bourély*). Article IX includes both debris and pollution in spite of the 1967 Space Treaty not using the

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12. CHRISTOL, C. Q.: *The Modern International Law of Outer Space*, New York etc., 1982, 130.

13 The Oxford Reference Dictionary p. 215.

14 Webster's Dictionary of English Language, New York 1991, 247 ("...broken pieces of rock transported and then deposited by a rush of water...").

15 In German literature HOBE, S. therefore is right using the word "Weltraumtrümmer" for debris. In Italian GROSSO, G. C.: *La responsabilitá degli stati per la attivitá svolte nello spazio extra-atmosferico*, Padova, 1990, 46. "frammenti i resti". Baker, H. A. uses the term "space refuse" instead of debris. [Cit. HACKET, G.: Space Debris and the Corpus Iuris Spatialis, Forum for Air and Space Law, (ed. BENKŐ, M.)], 209. The Hungarian "űrszemét" means similarly "space garbage", "űrtörmelék" "space broken fragments".

word "debris" (*S. Roy Chowdbury*). Contamination–pollution–debris are linked since they are all three able to produce environmental harm (*C.Q. Christol*). The term "contamination" includes effects of man-made objects (*A.A. Cocca*). Contamination includes debris and pollution as well as man-made objects causing such effects (*E. Konstantinov*). Some members expressed their doubts (*S. Gorove, U. Leanza, N.M. Matte, L.H. Siblesz*). Clearly negative point of view was taken by Professor *V. Kopal.* He did not think, that the intentions of the drafters of the 1967 Space Treaty was to include the effects of man-made objects and debris. Therefore only by means of an extensive interpretation would it be possible to conclude otherwise.[16] Not being member of the Committee I could not answer the same. The opinion that contamination as a legal concept covers debris too, seems to be generally accepted also in the space law theory.[17] Authors are willing to interpret not only the general clauses but also Article IX of the Space Treaty in the sense that through the term "contamination" it refers indirectly also to debris.

The ILA draft, in accordance with its intention, solves this problem in respect of the protection of the environment from damage caused by space debris.

a) "contamination/pollution" means a human modification of the environment by the introduction of undesirable elements or the undesirable use of those elements.

b) "contamination/pollution" will be considered as synonyms and are inclusive of all harmful elements *other than space debris.*

This wording makes clear that space debris do not belong to the elements causing contamination in the sense of Article IX Space Treaty. Through "to contaminate" and "to pollute" are philologically no synonyms, legally they can be. On the other hand it is not clear, what was the reason to mention in the first part of the definition "undesirable" and not "harmful" elements as it appears in the second part. The later is more interpretable than the far more subjective attribute "undesirable".

At any rate the Draft do not confuse contamination/pollution and debris as legally relevant phenomena cusing damage.

16 ILA Report 1990, 156–160.

17 BAKER, H. A.: Current Space Debris Policy and its Implications. Proceedings 32. Coll. Torremolinos 1989, 160.; COCCA, A. A.: Environment as a Common heritage of Mankind, Proccedings 32. Coll. 72.; CARVER, J. H.: *Protecting the Environment of Outer Space*, Note 7. 195. FASAN, E.: How to Legally Protect Outer Space Environment, Proceedings 32. 87.; HACKET: *op. cit.* (Note 15.) 119–120.; KOPAL, V.: *Some Remarks on Legal Aspects of Space Debris*, Note 7. 43.; ZBUKOVA-VASILEVSKAIA, G.: *Protection of Outer Space Environment According to the Norms and Principles of International Space Law*, Note 7. 102. etc. Differentiated treatment would prefer: GOROVE, G.: Space Debris in International Legal Perspective, Proceedings 32, 98.; GÁL: Note 11. in Note 17, 295.

Conceptual sphere of debris

The Draft defines debris as follows:

> ...man-made objects in outer space, other than active or otherwise useful satellites, when no change can resonably be expected in these conditions in the foreseeable future (I. c.).

The definition means that space debris are undoubtedly space objects—with all legal consequences of this qualification. On the other hand: debris are not only broken pieces, rubbish, wreckage etc. but also *inactive or not useful satellites.*

"Man-made objects in *outer* space" to my mind are objects orbiting round the Earth or other celestial bodies or put on the surface of a celestial body other than Earth by means of orbital movement.[18] Otherwise the definition of the draft do not restrict "debris" to a certain area of outer space or to a certain size of the object.

Concerning inactive satellites the Draft corresponds to the opinion of the majority of authors. Professor *L. Perek* e.g. minds: debris is understood generally to mean parts of space objects generated by break-ups of spacecrafts, rockets etc. Its characteristic attribute is being inactive and not serving any purpose anymore. In this respect there is no sharp limit between debris and non-functional space objects, the later conveying the impression of large objects down to a fraction of a millimeter.[19] An inactive satellite would be qualified as debris when its reactivation cannot be reasonably expected in the foreseeable future.[20]

This condition laid down in the Draft would easily cause disputes concerning applicability of the Convention. How can be stated without expressed declaration given by the operator that e. g. a telecommunication satellite will not be ready for service in one, two or ten years, since this time depends on the technical possibilities and financial capability of the owner respectively operator of the satellite. When is *the expectation reasonable* and what is the *foreseeable future*? To the definition of debris the Draft asserts a list of sources originating space debris. Latter may result, *inter alia*, from:

— routine space operations, including spent stages of rockets and space vehicles, and hardware released during normal maneuvers,

— orbital explosions and satellite break-ups whether intentional or accidental,

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18 GÁL, G.: Space Objects "While in Outer Space", Proceedings 37. Coll. Jerusalem, 1994, 84–86.

19 PEREK, L.: Technical Aspects of the Control of Space Debris, Proceedings 33. Dresden 1990, 400.; DIEDERIKS-VERSCHOOR, I. H. Ph.: *An Introduction to Space Law*, Deventer-Boston, 1993, 117.; HE QIZBI: *On Strengthening International Measures for Protection of Space Environment*, Note 7, 248.; HACKET: *op. cit.* (Note 15), 1.; BAKER, H. A.: The ESA and US Reports on Space Debris—Platform from Future Policy Initiations, cit. HACKET: *op. cit.* 209.; SCHWETJE, F. K.: *Liability and Space Debris*, Note 7. 31.; HOBE, S.: *op. cit.* (Note 15), 40. ("alle künstliche Gebilde im Weltraum, die nicht mehr gebraucht werden, weil sie ihre Funktion erfüllthaben.") etc.

20 In the position paper on orbital debris of IAA Ad Hoc Expert Group at the World Space Congress, Washington 1992: "Object which is non-functional, with no reasonable expectation of assuming or resuming its intended function or any for which it is or can be expected to be authorized".

— collision–generated debris,

— particles and other forms of pollution ejected for example, by solid rocket exhausts,

— abandoned satellites.[21]

This enumeration is of exemplificative character. It corresponds to statements of scientific analysis and reports, serving as a practical explanation to the definition of debris.

Scope of application

According to the Draft the Convention on debris would be concluded for the purpose of "protection of the environment from damage caused by space debris". Article II cinfines the scope of application to a narrower category of the debris population in outer space:

The instrument shall be applicable to space debris *which causes or is likely to cause* direct or indirect instant or delayed damage to the environment, or to persons or objects. In this context *environment* includes outer space and Earth environments within or beyond national jurisdiction (Article I. d). Damage means loss of life, personal injury or other impairment of health, loss of or damage to property, or any adverse modification of the environment of areas within or beyond national jurisdiction or control (Article I. e).

At any rate, the scope of application would cover an immense population of debris. The Satellite Situation Report of 30 September 1987 based on the tracking by NORAD listed 6895 space objects in around the Earth. The report estimated that only 2–5% of this population was operational, 21% not-operational payloads, 25% mission-related debris, 49% debris from satellite break-ups. In an other report of the Interagency Group in February 1989 the estimated debris population was for pieces greater than 10 cm 7000 objects, 1–10 cm 17500 and smaller than 1 cm 3 500 000 total weight 3 000 000 kg. According to a "Box Score" of catalogued space objects of January 1, 1992 the number of orbiting Earth satellites was 2034, tracked debris 4987, sum total 7021.[22]

Measurements indicate that the accumulation of man-made debris has already equaled or exceeded the flux of natural meteoroids in certain orbits. The probability of collision with debris has been orders of magnitude greater than for meteoroids.[23]

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21 "Particles and other forms of pollution" seems to be contrary to Article I. par. b).

22 U. S. Congress, Office of Technology Assessments, orbiting Debris: A Space Environmental Problem-Background Paper, 1990., Cit. HACKET: *op. cit.* 26., WIRIN, W. B.: Space Debris 1989, Proceedings 32. Coll. Torremolinos 1989, 185. "Boxed Score" of catalogued space objects by January 1, 1992, See Annex.

23 KESSLER, D. J.: Orbital Debris Issues. Advances in Space Research. Cit. REIBEL, D. E.: Prevention of orbital Debris, proceedings 30. Coll. Brighton, 1987, 147.

Up to now there are very few cases of collisions reported.[24] In scientific studies we find remarkable estimations of future risks and technical informations on potential collitions.

Some of them:

Reports estimate that based on the current and projected growth of debris population density there is a greater than 50% probability that one or more catastrophic collisions will occur by the year 2000.[25]

Effects of collisions are determinated by the size of debris and by the relative velocity.

For spacecrafts debris larger than 1 cm can cause catastrophic damage, while during extravehicular activity (EVA) a particle only 0,5 mm could rupture the pressure suit of the astronaut. The average collision velocity in low earth orbits (LEO) is about 10 km/sec. i.e. 28,000 km/h. This high velocity generates enormous kinetic energy. The impact of a particle weighing 100 gr. is equal to 1 kg of TNT.[26]

In the light of technical realities hundred thousands of debris in LEO are "likely to cause damage" to persons and objects involved in space flights.

The damages caused by debris most probably will be homogeneous. States, persons or international organizations which themselves operate spacecraft are threatened by space debris.[27]

Damages in the air space and on the surface of Earth (heterogeneous damages) in second place are to be expected. On the other hand debris—apart from NPS particles—are unlikely to cause any adverse modification of environment as defined in Article I. e. of the Draft.

Prevention, reduction and control of risks

Under the title General Obligation to Cooperate the Draft contains the obligation of states parties to the Convention "to cooperate directly and/or through the pertinent international organizations to prtotect the environment and implement this instrument effectively". (Article III. 1)

Paragraph 2. of this article is subordinated to the general obligation to cooperate, though to my mind this contains the most exact and positive obligation of the parties to the Convention:

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24 Well-known case was Shuttle flight STS–7. The crew detected a pit on the window of about 5 mm diameter containing titanium with a trace of aluminum. It was flake of paint from an other space object.

25 Report on Orbital Debris by Interagency Group (Space) February 1988., cit. WIRIN: in *op. cit.* (Note 22), 186.

26 HACKET: *op. cit.* 46–47. He quotes the German author P. Eichler who stated: "Anschaulich ausgedrückt befinden sich also praktisch Hunderttausende von hochbrisanten Sprenglagungen mit Aufschlagzündern im Erdorbit". (Kollisionsgefahr mit Weltraumschrott, Funkschau July 1989.)

27 REIFARTH, J.: *An Appropriate Legal Format for the Discussion of the problem of Space Debris*, Note 7. 305.

States and international organizations Parties to this Instrument shall take all propriate measures *to prevent, reduce and control any damage or significant risk* arising from activities under their jurisdiction or control which are likely to produce debris.

For possible measures reffered to in this Article may I rely to Professor L. Perek, an outstanding expert of this problem.

He has been suggested as

– *prevention measures*: minimizing the amount of debris produced in operational activities—avoiding unintentional explosions—prohibiting intentional explosions—maintaining an economy of space missions,

– *active measures*: removing inactive objects from low, high and intermediate altitudes—removing debris from orbit by remote action,

– *passive measures*: improving the flow of informations—evasive maneuvers—shielding of spacecraft.[28]

Preventive and active measures are directed towards the control, limitation, minimization and elimination, while passive measures are dictated by the necessity to live with present space debris (*W. B. Wirin*).[29]

According to the Draft the Convention would oblige states to take the necessary steps in their national legislation and/or administration of space activities in both directions. Prevention is the most realistic approach. It covers from specific measures in the design stage of spacecrafts to prohibition of putting garbage into orbit by astronauts many phases of space activity.[30]

From Article III. 2 follows the obligation of states to take measures to avoid unintentional and to prohibit intentional explosions of space objects as sources of resulting debris.

As to unintentional explosions: the possibility of *accidental explosions* or launch vehicle breakups due to operation failures cannot be eliminated.

The first break-up of a satellite occurred in 1961 with 280 trackable debris. Explosion of the upper stage in orbit may create hundreds or thousands of fragments. Such an explosion happened to seven DELTA launch vehicles between 1973 and 1981, to the ARIANE V 16 rockets in 1986. In latter case 495 pieces were tracked, the estimated number of smaller pieces down to 1 mm size was 2300 dispersed into vast regions.[31]

Deliberate breack-ups were mainly connected with mulitary space activities—reconnaissance satellites deliberately destroyed due to malfunctions in reentry, or destruction of orbiting targets in ASAT-tests.

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28 PEREK, L.: *Suggestions for the Future*, Note 7. 211–213., and Technical Aspects of the Control of Space Debris. Proceedings 33. Coll. Dresden, 1990, 400.

29 WIRIN, W. B.: *op. cit.* (Note 22), 190.

30 DIEDERIKS-VERCHSOOR: *op. cit.* (Note 19), 119.

31 HACKET: *op. cit.* 22. The ESA Report stated that six severe explosions created about 2000 debris. [Ablestar, Titan (2), Agena (3), Cosmos 1275, Cosmos 844, Cosmos 554].

Cold war is now over, it is perhaps to be expected that space powers will be more willing to take the measures provided in the Draft not to increase the population of debris in outer space.

Removal of debris

C. Hall referring to the accumulation in LEO of orbiting man-made debris 30 years stated: "Before long it will become mandatory to states to remove from orbit unmanned space vehicles and debris that pose a hazard to spacecraft navigation".[32]

Prevention and reducing of damage caused by space debris in the sense of the Draft Convention would be perfect only by removal of all debris at least in LEO. This is presently theoretically possible, practically not. Large objects, spent satellites, however, could be removed by utilizing a space vehicle with capability to rendezvous and bring back the satellite—being now a debris.

Other method of removal of satellites is the boosting out of orbit at the end of their useful life. After completing thier mission they can be set on a trajectory into the dense layer of the atmosphere, aiming their annihilation (accelerating the "self-cleaning") or into higher disposal orbit rarely used by satellites or far beyond GSO.[33]

The correction of the trajectory, however, necessitate special construction of space vehicles. The obligation of taking measures for prevention and reduction of damages as contained in the Draft could be interpreted in the way that parties to the Convention should do this.

To the problem of removal the logical question can be raised, whether a state other than the state of registry having this capability may remove space debris which are "likely to cause direct or indirect damage"?

The law of maritime nations contains rules for dealing with wreckage constituting dangerous obstacle in navigable waters. Except state vessels every wreck may be removed if it can cause any damage. *G. Hacket* puts the question: why in the law of the sea an abandoned object may be removed by any state other than the state of registry whereas in outer space this is not allowed?[34]

To my mind Article VIII of the Space treaty excludes the deorbiting of tracked and identified space objects by a state other than the state of registry. The latter retains jurisdiction and control over the object. Ownership of the object is not affected by its presence in outer space. A spent satellite is not "abandoned" with the legal consequence

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32 HALL, C.: Comments on Traffic Control of Space Vehicles. Journal of Air Law and Commerce 1965., 329.

33 PEREK, L.: *Technical Aspects of the Control of Space Debris*, Note 19. 404.; HACKET: *op. cit.* 27–28.

34 *Op. cit.* 197. Similarly DE SAUSSURE: An International Right to Reorbit Earth Threatening Satellites. 2 Annals of Air and Sapce Law, 1978, 390.; DIEDERIKS-VERCHSOOR reffering to maritime law: "If the owner fails to take the necessary steps it would seem reasonable that the owner of the threatened satellite should be authorized to do himself" (Remove the wrecked satellite). Harm Producing Events Caused by Fragments of Space Objects (Debris), Proceedings 25. Coll. Paris, 1982, 3.

that it should be treated as being a "*res derelicta*". The *animus derelinquendi* cannot be taken for granted. Implied authory to remove it do not exist, there is no *tacitus consensus* for such a measure taken by others. I share the opinion of *W. B. Wirin* who in this respect refers to U. S. practice with regard to maritime vessels, that abandonment cannot be implied from absence, even more a long period of time.[35] Nevertheless, this conclusion is not so clear-cut for fragments, space junks, garbage etc. orbiting as "not identified flying objects" in near-earth orbits. In this respect I would incline to admissibility of removal especially in case of an international undertaking for "cleaning" the near-earth space from debris.

Cooperation in prevention, information, consultation in good faith

Article IV the Draft referring to the general obligation set forth in Article II, contains as additional duties the cooperation in prevention of damage to the environment making every effort to avoid situations which may lead to disputes, further more in promoting the development and exchange of technology to prevent, reduce and control space debris. States parties to the Convention have to encourage and facilitate the flow and exchange of informations relevant to the instrument.

The necessity of international consultations in accordance with Article IX of the Space Treaty appears in Article IV. c of the Draft. The parties should hold consultations when they have reason to believe that a space activity produces debris that is likely to cause damage or significant risk thereto. Such consultation may be requested by any party when it has reason to believe that the space activity of another state is likely to cause damage.

The obligation to cunsult and the right to request consultation in the Draft are linked with two usual clauses:

refusal to hold consultations or the breaking up of such without justification shall be interpreted as *bad faith* (Article IV. c par. 3)

The parties have to negotiate in *good faith* which means *inter alia* not only to hold consultations or talks but also to pursue them with a view of reaching a solution (Article III. d).

Concerning the good faith: this essentially metalegal concept, otherwise incorporated in some civil laws, if accepted, could cause serious difficulties. Refusal to hold consultations is a clear behaviour, but justification of breaking up talks as well as the "view of reaching a solution", all can be highly questionable in a given case. Moreover, what is the legal consequence of "bad faith"? Probably not more than a favourable

35 Note 25. quoted by WIRIN: *op. cit.* Note 22. 187.

position of the other party when in case of damages caused by the space activity it comes to legal proceedings.[36]

Responsibility and liability

The Draft lays down principles of international responsibility and liability in accordance with existing rules of space law.

As a general rule Article VI stipulates that the rules of responsibility and liability of the Instrument apply to damage caused by debris *in the space* and in absence of other international agreements on the matter to damages caused to the earth environment.

The two terms responsibility and liability are often used interchangeably suggesting that responsibility is broader, encompassing liability of states.[37] In the system of the Draft responsibility appears clearly related to general international law obligations of states or organizations parties to the Instrument. Namely according to Article VII they shall bear international responsibility for assuring that national activities are *carried out* in conformity with the provisions of this Instrument, the 1967 Space Treaty and the 1977 Liability Convention.

This stipulation, however, is hardly more than a confirmation of obligations undertaken by this Instrument and two other basic space law treaties. In my humble opinion the wording of Article VII in this way would be more exact. Space activities can be carried out in conformity with the Space Treaty but not with the Convention on Liability.

International liability as set forth in Article VIII of the Draft is a logical consequence of the principle that *space debris are space objects:*

> Each state and international organization party to this Instrument that launches or procures the launching of a space object is *internationally liable* for damage arising therefrom to another state persons or objects or international organization party to this Instrument as a consequence of space debris produced by any such object.

This liability according to the general rule of Article VI apply to damages caused *in the space environment.* The Liability Convention accepted the distinction between objective (absolute) and fault liability. A launching state shall be *absolutely* liable to pay

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36 "Good Faith" as a rule in International law is questionable. According to SCHWARZENBERGER, G. e.g. "rules such as those underlying the principle of good faith ... it would be possible to argue their existence on the level of the general principles of law recognized by civilized nations". A Manual of International law. VI. Ed. London 1976, 27–28. WILLIAMS, M. stating that the obligation to negotiate "is well-established in international law" refers to the advisory opinion of the PCIJ concerning Railway Traffic between Lithuania and Poland of 1931: even sanctions may be applied in the event of an unjustified breaking off of the discussions or delays and, in general *in the absence of good faith.* In: Customary International Law and General Principles of Law. Note 7, 154.

37 HACKET, G.: *op. cit.* 154–159.; VON DER DUNK, F. G.: Liability versus Responsibility in Space Law: Misconception or Miscontruction? From Proceedings 34. Coll. 1991 published in "Space Law Syllabus of the Seminar Liability and Responsibility in Air and Space Law", Leiden, 1994, 15–23.

compensation for damage caused by its space object on the surface of the earth or to aircraft in flight (Article II). In the event of damage caused in outer space to a space object of one launching state by a space object of another launching state, latter shall be liable to pay compensation *due to its fault* (Article III).

The Draft do not differentiate in its own rule of liability, however, it refers to the Liability Convention. Would this mean that damage caused by space debris to a spacecraft would be compensated according to the rules of fault liability?

We may give two alternative answers to this question:

In case of collision between a spacecraft and a tracked and identified debris the launching state can be held responsible for an omission (fault) not having prevented the creation of debris which might infringe the freedom of outer space (S. T. Article I).[38] The Instrument, at least in relation of states parties, would support this interpretation since it obliges launching states to take measures to prevent any damage or significant risk arising from activities under their jurisdiction.

On the other hand the Draft do not differentiate between strict and fault liability. Article VIII therefore may be interpreted in the way that in case of damage caused by a debris the launching state shall be absolutely liable i.e. it will be judged by the result.

Dispute settlement

For the settlement of disputes concerning the interpretation or application of the Instrument Article IX primarily provides consultations as means of amicable solution.

The dispute shall be subject to consultation at the request of any of the parties. Failing this, if the parties within twelve months could not agree on a means of peaceful settlement, the dispute at request of any party shall be referred to arbitration or adjudication. To the procedure the ILA Draft Convention on the settlement of Space Law Disputes shall be applicable. This is, appended as an annex, integral part of the Instrument. However, each party to the Instrument may exclude in full or in part the application of Convention. Consequently for parties to a dispute which made use of thie right, rules of the Liability Convention on dispute settlement would be applicable.

Par. 4 of Article IX invests the court of arbitration with a very important right: prescribing interim measures to prevent serious damage to the environment, or persons, or objects. This measures taken in emergency cases are binding on the parties. They are obliged to implement the prescribed measures without delay.[39]

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38 HACKET, G. minds that "States are obliged by the Outer Space Treaty to prevent the creation of debris which might infringe the freedom of outer space. In case of creation of space debris states *will be held responsible for an omission...*". *Op. cit.* 164.

39 The wording "in these procedures it shall be possible..." raises the question how interim measures would be possible in proceedings based on the Liability Convention?

Studying the ILA Draft Convention on Space Debris we may rightly conclude that this work is a major step to the solution in the law making of an urgent problem connected with the intensification of space activities.

We have every reason to hope that as a useful contribution to the progressive development of space law it will be the basis of an international convention on this subject.

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Ágnes DÓSA

Legal Aspects of Combating AIDS in Hungary*

1. Introduction

Hungary's AIDS policy is to a large extent based on widescale mandatory HIV testing. This policy does not differ from the general approach taken by public health legislation. As with approaches to other infectious diseases, its primary goal is to identify as many infected persons as possible and to supervise them in order to prevent the spread of the infection. In the second half of the 1980s, when the current AIDS legislation was passed, respect for privacy and individual rights of the infected persons did not play a major role. At that time, under the authoritarian political system, society's interest—as defined and articulated exclusively by the ruling Communist Party elite—dominated the decision-making process.

A fundamental transformation of the political system, accomplished in 1989, made reform of the whole legal system necessary. Understandably, the legislature has given top priority to issues which have a major influence on the country's economy. Other fields, such as health law, have temporarily been neglected, so most aspects of current health law still reflect the paternalistic approach under which human rights and autonomy of patients are not held in high esteem.[1]

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* The author is deeply indebted to Professor Csilla Kollonay Lehoczky for her kind assistance on the labour law part and to Professor Péter Polt for his comments on the criminal law part of this article.

1 There are quite a few instances of medical paternalism in Hungary (e.g., legal regulation of informed consent or transplantation of human organs). KOVÁCS, J.: Bribery and Medical Ethics in Hungary, *Bulletin of Medical Ethics*, No. 66/1991, at 15–16 (providing more details on the subject).

However, there are three major exceptions. The first is the financial aspect of the health-care system. Substantial changes have been introduced in this area in order to make the economic foundations of health care more transparent and effective. The second exception is the regulation of civil commitment, where human rights concerns necessitated amendment of the legal framework of this special type of detention.[2] Last, but not least, the third exception is the Law on Handling and Protection of Health-Related Data, which became operative on 1 January 1998.[3] The Law addresses two major issues related to HIV: mandatory reporting and anonymous testing. It would be natural to expect that the development of democratic institutions and the formation of a more pluralistic society, accomplished in the past several years, would lead to a profound reevaluation of the legal responses to the HIV/AIDS problem. Specifically, one would expect that a democratically-elected Parliament would adopt more liberal legislation. Interestingly enough, this was not the case. The original version of the governmental draft submitted to the Parliament contained very liberal solutions, e.g., instituting anonymous testing and terminating mandatory reporting of HIV and AIDS. These matters sparked heated debate. Ultimately, the Parliament rejected the idea of anonymous testing and maintained mandatory reporting of HIV/AIDS.

In addition to health legislation, the legislature explicitly reacted to the HIV/AIDS problem in the context of immigration. Other aspects of the problem (such as criminal law or labour law) are not only untouched by the legislature but even court decisions are lacking. Consequently, when exploring the possible labour and criminal law ramifications of HIV infection, we can only apply certain general principles to this special condition.

2. *Demographics*[4]

In 1985 the first two HIV-positive persons were identified in Hungary; both were men who reported sexual contacts with other men. The first AIDS case was reported one year later. Since then a total of 520 (plus 104 anonymous) infected persons have been reported as of 31 December 1996.

2 DÓSA, Á.: New Legislation on Civil Commitment in Hungary, 14 *Medicine and Law*, Nos 7–8/1995, at 581–587.

3 Act No. XLVII. of 1997 on the Protection and Handling of Health-Related Data (1997. évi XLVII. tv. az egészségügyi és a hozzájuk kapcsolódó személyes adatok kezeléséről és védelméről).

4 The data in this chapter are mainly based on the unpublished report of the external review of the national AIDS program, conducted between in June and July 1995 by the World Health Organization Regional Office for Europe in collaboration with Hungarian experts.

Table I
Number of reported HIV-positive cases in Hungary as of 31 December 1996

Year	Male	Female	Anonymous	Total
1985	14	2	0	16
1986	65	4	0	69
1987	50	4	0	54
1988	24	5	0	29
1989	30	2	4	36
1990	39	0	1	40
1991	43	6	6	55
1992	43	2	16	61
1993	34	7	15	56
1994	37	4	24	65
1995	52	4	25	81
1996	38	11	13	62
TOTAL	469	51	104	624

Source: National Institute of Hygiene

The number of AIDS cases in the same period was 245; 157 persons in that group have died.

In comparison with most European countries, Hungary can be characterized as a relatively low prevalence country. This is partly due to the fact that, at the beginning of the epidemic, when only limited knowledge of the nature of the disease and of the ways of prevention was available, Hungarian citizens were unable to travel abroad as freely as today. For this reason the number of cases "imported" from abroad was relatively small. In addition, drug addiction was not a major problem. Despite a marked steady increase in drug use in the last few years, intravenous drug use is still not widespread.[5] Only one Hungarian intravenous drug user was found to be HIV positive during the 1986–96 period. The only intravenous drug user who died of AIDS, was a foreigner.

5 In 1996 the total number of registered drug addicts (not only intravenous drug users) was 1,654. *Népegészségügy*, No. 6/1996, at 22.

Table II
Number of reported AIDS cases as of 31 December 1995

Year	Male	Female	Total
1986	1	0	1
1987	6	1	7
1988	9	0	9
1989	15	0	15
1990	17	2	19
1991	29	1	30
1992	31	2	33
1993	28	4	32
1994	22	1	23
1995	28	3	31
1996	40	5	45
TOTAL	226	19	245

Source: National Institute of Hygiene

The low prevalence of HIV infection among haemophiliacs (4,4%) may, in turn, be attributed to the relatively late appearance of the virus in Hungary and to the rigorous implementation of strict laboratory screening procedures. In fact, all of the HIV-positive haemophiliacs were infected through coagulation factor concentrates imported in the early 1980s when there were shortages of locally manufactured coagulate products. Between 1985 and 1987, extensive screening of the haemophiliac population was conducted; 29 positive persons were found among 625 screened.

Recent estimates of the National Institute of Hygiene put the total number of HIV-positive cases at between 2,000 and 4,000.[6] The most affected regions of the country have been the capital city Budapest, and Győr–Moson–Sopron county which borders Austria. These two regions account for 85,5% of reported HIV infections in the country.

6 *Weekly Epidemiological Record* (WHO), No. 50/1995, at 357.

Table III
Number of AIDS cases and persons who died of AIDS, by transmission category, as of 31 December 1996

Transmission Group	AIDS Cases	AIDS-Related Deaths
Homo/Bisexual Men	179	118
Haemophiliacs	18	12
Transfusion Recipients	12	9
Heterosexual Contacts	22	10
I Drug Users	1	1
Mother to Child	1	1
Nosocimial	2	1
Unknown	10	5
TOTAL	245	157

Source: National Institute of Hygiene

According to official statistics, homosexuals still remain the most vulnerable community.[7] However, the increasing number of prostitutes, in particular prostitutes relocating to Hungary from other countries, and the greater supply of sexual services provided by minorities, have presented special concerns.

Hungary has a long-standing and impressive record in early diagnosis and treatment of the notifiable sexually transmitted diseases (other than AIDS), including contact tracing and preventive treatment of sexual partners of infected individuals.[8] The network of outpatient clinics for venereal diseases with trained staff is very well developed throughout the country. Other public health indicators are also impressive. For example, the percentage of Hungarian infants immunized against infectious diseases is well above the European average.[9]

7 The male to female ratio of seropositives is 11:1 which may be explained either by the predominant role of homosexual routes of transmission or by selective screening.

8 After years of steady decline, recent data indicate rapid resurgence in early symptomatic syphilis cases. The number of newly reported syphilis cases was 142 in 1993, 254 in 1994, and 239 in 1995 (data of the National Institute for Dermatology and Venereal Diseases). Although the trend can be considered statistically insignificant, this increase is nevertheless regarded by epidemiologists as a possible indication of the potential silent spread of HIV.

9 For *poliomyelitis* the European average in the period 1991–93 was 83% while 100% in Hungary in 1994;

3. Public Health Law

The chief priority of the current public health policy is clearly to protect the interests of society, first of all, by creating a legal framework to erect a barrier between the contaminated and the uncontaminated, and by devising effective methods of treatment and prevention. This policy is illustrated by the regulations governing detection and compulsory treatment of traditional venereal diseases.[10] In this field, very strict coercive legal measures may be applied. In particular, the public health authorities have the right to control various aspects of the patient's private life; the legal consequences connected to the disease might be very inconvenient for the patient. Of course, from the point of view of epidemiology, this type of regulation can be effectively employed by public health authorities. In fact, it seems that such a strict legal regime has substantially contributed to achieving good results in reducing the number of cases of venereal disease, and to a generally satisfactory public health situation. Whether such a regime is defensible from the civil rights and liberties point of view is another question.

Under current regulations governing the treatment and prevention of venereal diseases, a person who has contracted a venereal disease is obliged to undergo regular check-ups and submit to treatment.[11] If the patient does not comply with the treatment and—after repeated summons—does not visit the outpatient clinic, the physician may ask the police for help to compel the patient to undergo treatment. The prosecutor's approval is not needed for the implementation of this measure, which falls within the discretion of the outpatient facility physician. Since 1972, however, involuntary hospitalization of venereal patients has not taken place because of the lack of secure establishments for such purpose. Theoretically, though, involuntary hospitalization of such patients is possible.

The patient is obliged to disclose the identity of persons with whom he had sexual contact. These persons must then undergo treatment, and the above-mentioned coercive measures may be applied to them as well. Two hundred and fifty contact persons were named by syphilis patients in 1995 (compared to the 239 newly registered syphilis patients), among whom 81 were found infected; an additional 98 were treated preventively. The police were involved in fewer than 2% of cases.

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for diphtheria, whooping cough and tetanus the European average was 78%, while in Hungary it was 99.9%; as to BCG and *morbilli* the European average is 82% while 99.9% in Hungary. *World Health Statistics Quarterly*, No. 3–4/1995, at 288; *Népegészségügy*, No. 12/1995, at 235.

10 Syphilis, gonorrhoea, ulcus molle, and lymphogranuloma venereum. Although AIDS is not classified as a venereal disease, certain elements of AIDS legislation are very similar to that of venereal diseases (contact tracing, partner notification, etc.). The outpatient care of HIV/AIDS patients is also assigned mostly to the venereal disease clinics.

11 Act No. II. of 1972 on Health Care (1972. évi II. tv. az egészségügyről) Sec. 32; Ordinance 15/1972 (VIII. 5.) of the Minister of Health Care on the implementation of provisions of treatment and prevention of Act No. II. of 1972 on Health Care [15/1972 (VIII. 5.) EüM. rendelet az egészségügyről szóló 1972. évi törvénynek a gyógyító megelőző ellátásra vonatkozó rendelkezéseinek végrehajtásáról] Sec. 35–40.

As to AIDS policy, emphasis is placed on testing procedures. In deciding which group has to undergo testing, individual privacy interests are balanced against the public's "need to know." Hungary's current legislation places the public interest first—the regulations impose compulsory testing on a very wide range of people.[12] The consequences of positive test results are rather serious for the infected person and are very similar to those of venereal disease patients. It is important to note that the current testing policy is clearly not in compliance with the recommendations and guidelines of international organizations active in the field of public health.[13] Hungary has so far resisted any pressure from these organizations to change its testing policy.

The following groups are subject to mandatory or compulsory testing:[14]

a) Patients suffering from venereal diseases or those with clinical indications of venereal disease.[15] Patients attending the outpatient venereal disease clinics are tested routinely for HIV without their express consent when they exhibit early symptoms of any kind of venereal disease. In the 1993–94 period, a total of 28,157 patients were tested for HIV; 14 tested positive. From the public health point of view this is the most effective way of testing for HIV, as venereal disease patients are more likely to have contracted HIV than other population groups. Most Hungarian clinics treating sexually transmitted diseases are still state-run, but the few private clinics are also obliged to report identified HIV/AIDS cases.

b) Sexual partners of HIV-positive persons and other persons the HIV-positive person had contact with, and who might have transmitted the disease.[16] This provision allows extensive contact tracing. It imposes the duty of submitting to HIV testing not only on the sexual partners of the HIV-infected person but also on anyone in the HIV-positive person's surroundings who is at risk of infection (e.g., the medical staff treating the patient). However, in the absence of effective treatment of AIDS, the infection chain cannot be broken. Therefore, the only aim of the testing may be the notification of the

12 Ordinance No. 5/1988 (V. 31.) of the Minister of Social and Health Care Affairs on the measures taken in order to prevent the spread of AIDS. [5/1988. (V. 31.) SZEM rendelet a szerzett immunhányos tünetcsoport terjedésének meggátlása érdekében szükséges intézkedésekről és a szűrővizsgálat elrendeléséről.]

13 See, e.g., *Council of Europe*: Recommendation No. R. (89) 14 on the ethical issues of HIV infection in the health care and social settings; The *World Health Organization*: Statements from the Consultation on Testing and Counselling for HIV infection (Geneva 16-18 November, 1992); The *European Union*: Resolution of the Council of and the Ministers for Health of the Member States, meeting within the Council of 22 December 1989 on the fight against AIDS; Conclusions of the Council and the representatives of the Governments of the member States, meeting within the Council of 31 May 1988 concerning AIDS. These international instruments consider compulsory testing unethical and counterproductive. The emphasis is laid on voluntary testing. More on this topic in Danzinger, D.: Compulsory Testing for HIV in Hungary, *Soc. Sci. Med.* No. 8/1996, at 1199–1204.

14 According to the terminology adopted in Recommendation R. (89) 14 of the Council of Europe, testing is considered mandatory if it is mandated by law in order to permit participation in an activity which in itself constitutes a voluntary act. A testing procedure can be considered compulsory if the test is required by law, if informed consent is not sought, and if refusal may result in sanctions.

15 Decree No. 5/1988. Sec. 1/a.

16 Decree No. 5/1988. Sec. 1/b.

infected person about seropositivity and calling this person's attention to those rules which are designed to prevent the further spread of infection.

c) Intravenous drug users.[17] In practice, this method of detecting HIV-positive patients is ineffective because most clinics do not comply with this legal obligation. The Decree does not specify when the test should be carried out or whether it should be periodically repeated.

d) Prisoners.[18] Persons sentenced to imprisonment, but not pretrial detainees, also have to undergo testing. Those who test positive are to be placed in the medical care facility of the correctional institution. They should be treated once they start to exhibit clinical indications of the disease.

e) Inmates of juvenile correctional facilities.[19] A person who commits a crime between the ages of 14 and 18 may be sentenced to detention in a juvenile facility, which is a milder measure than regular prison. Juveniles detained in this type of correctional facility also have to undergo testing.

f) Prostitutes.[20] Prostitution was a crime until 1993, when it was removed from the Criminal Code and became an administrative offense, carrying minor penalties. Some forms of activities associated with prostitution, like soliciting prostitution, are still criminal. Every person charged with a prostitution-related activity has to undergo HIV testing during criminal proceedings. The Decree does not specify at which stage of the proceedings the test should be conducted and whether it should be repeated.

In addition, mandatory testing takes place in situations related to tissue and organ transplantation. In cases where organs or tissue are removed from deceased persons, a transplant may proceed only if an HIV test is conducted and proves negative.[21] In cases of organ and tissue donation among living persons, a donor must be tested for HIV before the transplant may take place. Sperm samples used for the purposes of artificial insemination may be utilized only after a certain time period has elapsed. Sperm donors have to undergo HIV testing twice: first, at the time of donation, and then six months later. The sperm may be utilized only if both samples test negative.[22]

Testing of blood samples was gradually introduced in Hungary at a relatively early stage of the epidemic (between March and July of 1986). During the first three years, 10 samples tested positive. All were attributable to first time blood donors belonging to homo- or bisexual risk groups, who donated blood primarily to learn about their HIV status. Each prospective blood donor has to be informed that the blood will be screened for the presence of HIV antibodies.[23] The prospective donor is further informed that,

17 Decree No. 5/1988. Sec. 1/f.
18 Decree No. 5/1988. Sec. 1/d.
19 Decree No. 5/1988. Sec. 1/e.
20 Decree No. 5/1988. Sec. 1/c.
21 Decree No. 5/1988. Sec. 7. subsec. 1.
22 Decree No. 5/1988. Sec. 7. subsec. 2.
23 Decree No. 5/1988. Sec. 7. subsec. 3.

should the test results be positive, the donor will be notified and registered, and that he is to bear the consequences of the positive test result.

Finally, the problem of mandatory testing can arise in a clinical setting. If a physician examining a patient concludes that the patient's symptoms might be related to HIV infection, he must order an HIV test.[24] Whether the physician has the legal obligation to obtain the patient's consent is unclear. However, suing the hospital for lack of informed consent in that case would not seem promising. As previously mentioned, Hungarian health law has retained a paternalistic approach to the doctor-patient relationship under which the physician plays the dominant role. In fact, the doctrine of informed consent did not develop until quite recently.[25] The issue is still inadequately regulated by the health legislation. There is now an increasing support among physicians and patients for a legal solution that would meet the needs of a democratic society. Despite the lack of clear legal guidelines, the ethical obligation of informing the patient and asking for his consent has taken root in the medical community. One may note here that general principles of contract law require detailed information for consent to be legally valid.

Unfortunately, Law No. II on Health Care does not impose a general obligation of informed consent. Instead, it requires the patient's consent only in some cases (e.g., hospitalization, surgical procedures and organ transplants).[26] The Law is still based on the premise that if a patient decides to be seen by a physician, then the patient impliedly consents to all the tests and treatments ordered by the physician.

For a short period, HIV screening of all pregnant women was mandatory under a 1992 Ordinance of the Minister of Welfare, but due to high costs and minimal benefits the provision on mandatory screening was repealed.[27]

Citizens entitled to public health-care services, who want to know their HIV status, may undergo testing on a voluntary basis free of charge. If they test positive, however, they have to bear the consequences connected with a positive test result described above: registration, mandatory regular check-ups, contact tracing, etc.

There are only two anonymous test centers in the country. Since their introduction in Budapest in 1988, almost 10,000 samples have been tested; of these some 90 tested positive. Of course, it may safely be assumed that some of these HIV-positive persons were previously examined elsewhere and only came to the anonymous test site for verification. For this reason, these test results are registered separately in the official statistics.

Prior to 1992 the Budapest test centre operated without substantial financial support; the physicians, assistants, and the operators of the AIDS hotline were all volunteers.

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24 Decree No. 5/1988. Sec. 6.

25 KOVÁCS, J.: Medical Ethics Activities in Hungary, *Bulletin of the European Philosophy of Medicine and Health Care*, No. 1/1994, at 13.

26 Act No. II. Sec. 47. subsec. 3.

27 Ordinance No. 33/1992 (XII. 23.) of the Minister of Welfare on Prenatal Care [33/1992. (XII. 23.) NM rendelet a terhesgondozásról].

Unfortunately, the personnel faced substantial opposition from the public. At the very beginning it was difficult to find an appropriate place for the centre as the people living in the neighbourhood tried to impede the centre's establishment. The second anonymous test centre was opened in 1994 in Pécs, in the southern part of Hungary.

Until 1997 there were no specific provisions allowing or prohibiting anonymous testing, so the two test sites operated for years without express legal authorization. With the preparation of the bill on the Protection and Handling of Health-Related Data in 1997, the question could not be avoided any longer; the legislature had to make a definitive decision.[28] During the heated public debate, various arguments were raised for and against anonymous testing. Public health policymakers found it unacceptable that while mandatory testing imposed a substantial burden on a wide range of people (including all the consequences following the test), many others could avoid the harsh public health measures simply by choosing anonymous testing. In their opinion, the primary aim of HIV testing was to break the chain of transmission by all possible means. As anonymous testing does not allow for proper follow up, it does not serve the needs of the public. In response, proponents of anonymous testing warned that the lack of respect for privacy, and the resulting lack of control over those to whom the results are communicated, might discourage many from voluntary testing unless it was offered on an anonymous basis.

Ultimately, after a long and heated debate the Parliament adopted a rather controversial model. Under the 1997 Law, a person wishing to undergo HIV testing is not obliged to disclose his personal data to health-care personnel before the test. However, should the test be positive, then the testee is required to reveal his identity and bear the consequences related to the positive result. Those wishing to undergo testing have to be told in advance that anonymity is guaranteed only as long as the test is negative. It is unclear how this regulation may be enforced (e.g., how to compel someone to give personal data if he is not willing to). In fact, anonymity becomes relevant for the individual only if the sample tests positive; if the test result is negative, it is of no importance at all. Some predict that the solution accepted by the Parliament will radically decrease the number of persons visiting the "anonymous" (if they still merit the name) test centres.

The consequences resulting from positive test results are very similar to those following the application of traditional public health measures which proved highly successful in the treatment of venereal disease patients. The first step is verification of the diagnosis. If it is confirmed, then the laboratory notifies the outpatient clinic in charge of the treatment of HIV-positive patients.[29] If the seroconversion occurred as a consequence of blood transfusion, then the lab has to contact the National Institute for Haematology and Blood Transfusion. If the patient contracted the disease through sexual contact, then the lab notifies an outpatient clinic treating venereal diseases which must

28 Act No. XLVII, of 1997.

29 Decree No. 5/1988. Section 3. subsec. 1.

register the patient. From then on, the patient must visit the clinic for regular check-ups. During the first visit the physician informs the patient of his seropositivity and provides detailed information on the disease, the possible modes of transmission, and the behavioral rules with which he must comply.[30] The assistance of the police may not be used to compel the patient to come to the clinic, although involuntary hospitalization may be ordered.[31]

From the very beginning of the epidemic, reporting of both HIV infection and AIDS at any stage of the disease has been mandatory. The person's full name and address was to be provided to the local public health service and to the National Institute of Hygiene—just as with any other infectious disease. The National Institute was required to send a copy of the report to the Institute of Haematology and Blood Transfusion, and to the National Institute of Venerology. The only requirement intended to protect privacy was that the report had to be mailed in a sealed envelope.

The new 1997 Law on the Protection and Handling of Health-Related Data developed a new scheme for reporting infectious diseases.[32] Two different categories of cases have been distinguished. If a case falls under the first category, then the physician reports the disease with the patient's full name and address to the local public health authority (the vast majority of the infectious diseases belong here). In turn, if a case falls under the second category, then only the diagnosis is to be reported, without any personal data. The second category includes cases of sexually transmitted diseases, tuberculosis, nosocomial infections, and HIV/AIDS. Under the original governmental draft, AIDS and HIV were exempted from mandatory reporting as they were not listed in any of the two groups. The Parliament, however, decided to include HIV/AIDS in the second category. Although these infectious diseases are reported without personal data, the public health authorities may require these data "if it is justified by public health reasons."[33]

As to communication of test results, the physician at the outpatient clinic has to inform all the physicians having contact with the patient of the individual's seropositivity, including the patient's general practitioner.[34] This procedure has been slightly modified by the Law on the Protection and Handling of Health-Related Data. In a case of infectious diseases, data may be (but do not have to be) forwarded to other physicians taking part in the treatment of the patient, even in spite of the patient's objections.[35] Although all the physicians are obliged to observe the rules of professional confidentiality, the more people who know about a person's HIV status, the less likely it is to remain secret.

30 Decree No. 5/1988 Section 3. subsec. 4.
31 Act No. II. on Health Care. Section 16. subsec. 2.
32 Act No. XLVII of 1997.
33 Act No. XLVII of 1997. Sec. 15. subsec. 2.
34 Decree No. 5/1988. Sec. 9. subsec. 3.
35 Act No. XLVII. of 1997 Sec. 10. subsec. 2.

4. Immigration Law

The number of immigrants entering Hungary is quite substantial. The majority come from the former Hungarian territories (mainly from Romania). In addition, a great number of people seek refugee status as a result of the protracted war in former Yugoslavia.[36] If we consider the number of refugees per 10,000 inhabitants, Hungary is fifth in Europe (with a total of 18,000 refugees). Relative to its gross national product, Hungary accommodated the most refugees, even more than Germany.[37]

The explicit public health objective of the current immigration policy is that migration from abroad should not increase the number of AIDS cases in the country. For this reason immigration restrictions do not refer to those belonging to high-risk groups but try to ban generally the admittance of those who exhibit symptoms of the disease. There are, however, no measures introduced against Hungarian citizens travelling abroad; in particular, Hungarian nationals returning from foreign countries with high incidence of AIDS do not have to undergo HIV testing. As to foreigners who wish to enter the country, there are no systematic health checks at the border. Short-term visitors are not required to certify their HIV status. Public health measures apply exclusively to those who wish to stay in the country for a longer period of time.

Under current legislation, the issuance or extension of visas or residency permits, and the issuance of immigration permits may be denied in the interest of public health.[38] This is especially true if the petitioner suffers from AIDS, tuberculosis, leprosy as well as if he is in a state of virulent syphilis and/or a carrier of pathogens, or is a bacterium carrier of typhoid and paratyphoid.[39] Curiously enough, syphilis is treated more harshly than AIDS: in syphilis cases, even the carrier of pathogens can be rejected, while the HIV infected may not be rejected exclusively on the ground of seropositivity.

Those applying for visas or the extension of their visas, and for residency up to one year, do not have to undergo HIV testing; they only have to give a statement as to whether they suffer from AIDS.[40] Making a false statement, however, or admitting

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36 As reported by the National Office of Immigration and Refugees, the total number of refugees arriving from the territory of former Yugoslavia between 1991 and 1995 was 75.531.

37 TÓTH, J.: *Towards a Refugee Law in Hungary*, in Genesis of a Refugee Regime, the Case of Hungary (H. ADELMAN, E. SÍK and Gy. TESSÉNYI eds.), 1994. 87–91.

38 Act No. LXXXVI of 1993 on the Entry, Stay in Hungary and Immigration of Foreigners (1993. évi LXXXVI. tv. a külföldiek beutazásáról, magyarországi tartózkodásáról és bevándorlásáról); Government Decree No. 64/1994 (IV. 30.) on the Execution of Act LXXXVI of 1993 on the Entry, Stay in Hungary and Immigration of Foreigners [64/1994 (VI. 30.) Korm. rendelet a külföldiek beutazásáról, magyarországi tartózkodásáról szóló 1993. évi LXXXVI. törvény végrehajtásáról.]

39 Act No. LXXXVI. Sec. 23. subsection 1/e.; Decree Sec. 32.

40 Decree 64/1994. Sec. 33, subsec. 1.

AIDS infection, may lead to prohibition of entry or stay in the country, or even to expulsion. The decision falls within the discretion of the immigration officer.

In cases concerning applications for long-term residency permits (over one year) or for immigration, proof that the applicant is not suffering from AIDS is a precondition for obtaining an approval.[41] Seropositivity alone, without evident symptoms of the disease, is not a ground for denying permission. A statement by the applicant is not sufficient in such cases; an official medical certificate is required. The certificate may be obtained in Hungary or in the petitioner's home country. In the latter case, the National Public Health Service makes the decision as to its recognition.

Each person intending to take up long-term residence in Hungary has to undergo HIV testing. If the test is positive, the applicant has to undergo a medical examination in the designated hospital. If there are no evident symptoms of the disease, permission may not be denied for public health reasons. However, the applicant is required to sign a written statement that, during his stay in the country, he will voluntarily undergo regular check-ups, and will comply with all those behavioral rules communicated by the public health authority to the patient, which are designed to reduce the risk of transmitting the disease. In contrast, if there are evident symptoms of the disease, then permission may be denied for public health reasons. This decision falls within the discretion of the immigration officer.

As to the regulation of employing foreigners, there is no general requirement of certification regarding HIV-antibody status. However, as the working permit may not be granted unless the foreigner has a valid visa or residency permit, the above-described procedures determine the preconditions of conducting any legal activity for profit.

When it comes to refugees and asylum seekers, the United Nations Refugee Convention (1951) and the 1989 Government Decree do not explicitly require the certification regarding an HIV status.[42] However, in such cases the application may be refused on the ground of public health concerns. The Decree does not specify in detail what amounts to a danger to public health which permits such a refusal. Even after refugee status has been granted, public health concerns might still result in the revocation of permission. However, if the refugee is able to prove that he became seropositive after the permission had been granted, the permission may not be revoked.

41 Decree 64/1994. Sec. 33, subsec. 4.

42 Government Decree No. 101/1989 (IX. 28.) on granting the refugee status [101/1989 (IX. 28.) MT rendelet a menekültként elismerésről].

5. Labor Law[43]

Employers have a strong interest in learning as much as possible about prospective employees to assess their capacity to perform the job. In particular, the employee's health condition might be of importance.

An HIV seropositivity might be of importance to the employer for two separate reasons. First, the HIV-infected person might become sick and thus unable to perform the job. The employer would then have to face the costs and inconveniences associated with an ill employee. Second, the employer would have to prevent the possible infection of other workers, especially if the job is of such a nature that substantial risk of transmission is real.

The issues to be discussed in this context arise at the very beginning and the very end of a labour contract. First, does the employer have a right to inquire about the health status of the prospective employee and/or to demand an HIV test? Second, may an employee be dismissed on the ground of seropositivity or on the ground that HIV status was not disclosed during the hiring process?

According to the Hungarian regulations on pre-employment medical examinations, the vast majority of prospective employees must undergo a medical examination before being hired.[44] The aim of this examination is defined broadly—it is meant to assess the applicant's suitability for the job. Specific tests are required for various jobs, but none of them include HIV testing. Even in the health-care setting, where the existence of numerous infectious diseases has to be ruled out in order to be hired, there is no legal obligation to produce an HIV test result.

The regulations do not restrict the employer's right to require the applicant to undergo other examinations. However, the employer's right to ask for a certificate of the applicant's HIV status, or to have him/her make a declaration on this matter, is restricted by the Labor Code's general provision. This provision states that, during the hiring process, only data which do not violate the applicant's privacy rights or dignity and which entail essential information related to the employment contract may be requested.[45] It is obvious that health-related data may determine not only the applicant's chances to get or keep a job. In some instances the applicant's privacy rights might be violated if the employer learns confidential data about him.

The basic question to be decided at this point is whether a possible HIV infection is the kind of information which is acceptable in view of the Labor Code's provision.

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43 Generally on Hungarian labor law: KOLLONAY LEHOCZKY, Cs.: Labor Law in Hungary, in: *Legal Reform in Post-Communist Europe* (FRANKOWSKI, S. and STEPHAN, P. B. eds.), 1995, 409–431.

44 Ordinance No. 4/1981. (III. 31.) of the Minister of Health Care on the medical examinations carried out to assess the ability to work [4/1981. (III. 31.) EüM rendelet a munkaköri alkalmasság orvosi vizsgálatáról és véleményezéséről]. These regulations still reflect the conditions when most people were employed by state enterprises. Nowadays with the emergence of private businesses it is becoming more and more difficult to enforce these provisions.

45 Act No. XXII of 1992 on Labor [1992. évi XXII. tv. a Munka Törvénykönyvéről]. Sec. 76.

Generally, the HIV test in itself does not say much about the employee's further ability to work due to the substantial uncertainty as to the timing of developing AIDS. But an HIV test could be considered essential information in this context if the employee might pose significant risk of infection to others. Although HIV infection is not transmissible by casual contact, health-care personnel involved in invasive medical procedures might get infected even if utmost care has been taken. Although the risk is very low, it can still be considered a significant factor given the severe consequences of infection. Under this approach, an HIV infection might be considered essential job-related information especially in the case of health-care workers involved directly or indirectly in invasive procedures.

There are few legal sanctions for an unlawful rejection of one's job application. As the employer has no obligation to reveal the reasons for rejection, such cases could hardly be brought to court. Grounds for judicial review exist only where the applicant has reason to believe a dismissal was discriminatory. The Labor Code prohibits discrimination on the traditional grounds of race, sex, age, and national or ethnic origin and also because of religion, social origin, political views, membership in any organization, and on any ground not related to the labor contract.[46] Therefore, in those cases where HIV infection is unrelated to the nature of employment, refusal to hire on the ground of HIV infection could be considered as amounting to discrimination.

Termination of labor contracts on grounds of HIV seropositivity is a more complex matter. In this context Hungary's labor law system has different sets of rules depending on the type of employment. In particular, separate statutes regulate employment in the public sector (health, education, and cultural agencies financed from the state budget)[47] and the employment of public servants.[48] There are considerable differences among the respective statutory rules. These differences are most striking regarding the grounds for terminating labour contracts. In the private sector, termination of a labour contract is possible if the employer has just cause. The cause may be related to the employer's business. It may also derive from the employee's conduct or ability to perform the job to the employer's satisfaction. In the latter cases, dismissal must be preceded by notice of 30 days to six months. In addition, the employee is entitled to a severance payment, depending on the length of service. However, if the employee breaches an important duty by intentional or grossly negligent conduct, or if the employee's conduct makes continuation of the employment impossible, immediate dismissal is possible.

However, in cases involving public servants or those employed in the public sector, the employer's ability to terminate the contract unilaterally is much more restricted.

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46 Labor Code, Sec. 5.

47 Act No. XXXIII of 1992 on Public Employment (1992. évi XXXIII. tv. a közalkalmazottak jogállásáról).

48 Act No. XXIII of 1992 on Public Servants (1992. évi XXIII. tv. a köztisztviselők jogállásáról).

Even ordinary dismissal may only take place in cases specified by law. The employer may terminate the contract for two reasons: the employee's inability to perform the job, or his eligibility for retirement. If the inability is due to health reasons, then the employer is obliged to offer another suitable job. Finally, the severance payment is substantially higher than in the private sector.

In most cases, an HIV infection by itself should not be deemed a cause for termination of employment as HIV cannot be transmitted by casual contact, and is usually irrelevant to the employee's ability to work. Therefore, HIV infection may be considered neither material from the point of view of the job performed nor as disabling the employee to perform the job. The only case where it could possibly lead to termination of the labour contract is where real danger of infection exists. In cases involving private sector employees (e.g. private dentists), the risk of infection would probably be high enough to terminate the contract. In cases involving employment in the public sector (the vast majority of health-care workers are employed here), it would have to be shown that, due to the infection, the employee is unable to perform the job. There are quite a few situations in which carriers of infectious diseases are considered unable to perform certain jobs (e.g., persons suffering from tuberculosis or syphilis who work in neonatal units), so it is likely that the court would approve terminating a contract in quite a few instances.

The employer has the right to demand that his employee undergo a medical examination at any time in order to assess his ability to work. If the employee does not comply, then the employer has the right to prohibit him temporarily from working.

It seems that termination of a labour contract on the ground of HIV has never taken place. In the very few cases of HIV-positive surgeons and dentists, it was enough to persuade them to refrain from carrying out invasive procedures[49] (similar to the cases involving health-care workers carrying hepatitis virus; hepatitis due to its high frequency is in practice a much more critical problem than HIV).

If the applicant during the hiring process intentionally misleads the employer concerning a material fact or condition, the contract will be declared void. In the AIDS context it can be hardly applicable, however, as the proceedings have to be initiated within six months after the contract has become binding.

6. *Criminal Law Aspects of HIV/AIDS*

Because Hungary has had few HIV cases, it is no wonder the country has no specific criminal provisions regarding HIV. The question then arises whether traditional criminal offenses would be applicable in situations of HIV infection. No cases criminalizing the transmission of HIV have arisen; consequently, no court decisions are yet available.

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49 Personal communication of Professor István Dömök, former Deputy Director of the National Institute of Hygiene, Budapest.

As to transmission of venereal diseases other than HIV, the judiciary found that the transmission of syphilis could be characterized as "causing serious bodily injury."[50] This means that if the infected person, being aware of infection, engages in activity likely to transmit the disease, then this person may be convicted of causing bodily injury. Therefore, if an HIV-positive person practices unprotected sex without informing the other about his seropositivity, then the charge of causing bodily injury (if the sexual partner becomes HIV positive or develops AIDS) or even homicide (if the partner dies) could be brought.

In cases of transmission of HIV, however, several difficulties might arise with the application of bodily injury charges even if one is ready to accept that HIV infection itself (even without any symptoms) amounts to bodily injury. First, it would have to be proven that the victim was not HIV positive prior to the sexual act, and that he did not acquire the infection in some other way. If both the defendant and the victim belong to a high-risk group, then proving the causality seems almost impossible. Second, it also would have to be proven that the alleged offender was aware of his seropositivity. If the offender is not a registered HIV patient but tested at an alternative test site, serious problems of proof would obviously arise.

If someone knowingly engages in activity likely to result in HIV infection but causality between the act and the infection cannot be proven, then attempted bodily injury or attempted murder charges may be considered. Problems of proof, however, might also present difficulties here. As the state of mind of the alleged offender is at issue here, it has to be proven that the defendant, being aware of his HIV status, intended to cause a bodily injury to, or the death of, the victim. It would be enough to prove in this context that the defendant either intended the harm (*dolus directus*) or accepted it as a possible consequence of his conduct (*dolus eventualis*). If one of these two states of mind could not be proven, then the attempt charge would fail. Obviously, actual transmission of HIV need not be proven in such cases.

The issue of the victim's consent requires separate treatment. Although consent as a defense is not mentioned in the Criminal Code, both legal theorists and judges agree that in some instances the victim's consent may exclude criminal liability. However, there are obviously limits to the degree of physical harm to which a person may effectively consent. Unfortunately, it is by no means clear where the line is to be drawn. The seriousness of the bodily harm is an important factor but not the only one. In cases of assault (where the injury heals or recovery occurs within eight days) the informed consent of the victim is considered effective. In contrast, in cases of serious bodily injury or homicide the answer hinges upon finding whether the act

50 ANGYAL, P.: *A magyar büntetőjog kézikönyve. A testi sértés és a közegészség elleni büntettek és vétségek (Manual of Hungarian Criminal Law. Assault, battery and crimes against public health)*, 1928, 21–22.

itself was injurious to the public interest.[51] The fact that unprotected sexual contact with an HIV-positive partner endangers life does not alone exclude consent as a defense. A case may arise where a defendant discloses his seropositivity to his/her partner, and the partner voluntarily engages in sexual activity being aware of the danger of HIV transmission. If the partner then becomes HIV positive or develops AIDS, a court would have to decide whether such a situation should be evaluated differently from one where, e.g., a victim voluntarily engages in an extremely dangerous sporting activity.

Another possible criminal charge might be that of reckless endangerment. This charge may be filed if someone—in violation of professional rules—recklessly engages in conduct that places or may place another person in danger of death or serious bodily injury.[52] For example, it seems that a health-care worker who improperly uses infected needles could be convicted of reckless endangerment. Obviously, it would be unnecessary to prove that the defendant's conduct actually harmed the other person. Let us stress that this charge may be brought only in those cases where the endangerment involves the violation of professional rules.

There are specific criminal provisions directed at the transmission of infectious diseases. The Criminal Code contains one crime specifically related to the infringement of the rules concerning the control of infectious diseases.[53] There is also one semi-administrative offense related to the same matter.[54] The latter might be applicable in the AIDS context because any infringement of public health rules is punishable (the applicable penalty in this instance is a small fine). In practice, this provision has been applied extremely rarely.[55]

Finally, one criminal procedure issue should be briefly mentioned. In criminal proceedings, a defendant must undergo necessary medical examinations as determined by the court. A defendant only has the right to object to a surgery or similar procedure. The HIV status of the alleged rapist may thus be established in criminal proceedings even if he objects to testing.

7. Conclusion

Although the level of HIV infection has been relatively low, the epidemic has challenged the Hungarian legal system in many ways. The country's HIV/AIDS policy, however, has remained basically the same. This is puzzling in view of the radical

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51 HORVÁTH, T.: *Az élet, egészség, testi épség büntetőjogi védelme. (The protection of life and bodily integrity in criminal law.)* 1965, 407–412.

52 Criminal Code Sec. 171.

53 Criminal Code Sec. 284.

54 Decree 17/1968. (IV. 14.) on certain administrative infractions. [17/1968. (IV. 14.) Korm. rendelet egyes szabálysértésekről] Sec. 67–68.

55 The maximal amount is approximately 170 $. In 1995 the penalty was imposed only in 6 cases in the whole country. The average amount of the fine was $85. Source: National Institute of Hygiene.

socio-political systemic transformations after 1989. Most experts predicted that the legislative reforms in the HIV/AIDS field would be based on the acceptance of democratic values such as individual freedom and personal autonomy, especially when it comes to the most intimate aspects of life. Consequently, to give just one example, many experts expected that voluntary HIV testing would become the norm. However, the Law on the Protection of Health-Related Data did not enhance the protection of confidentiality of medical data in the HIV context. Although the government proposed fairly liberal solutions, the Parliament opted for a more rigid option in view of the fact that the paternalistic attitude towards patients, including HIV patients, is widely accepted in the society. All in all, Hungary still remains at a crossroads. The liberal model adopted in Western Europe is an ideal favoured by many, especially those who support rapid and full integration of the country into the Western community of nations. At the same time, however, the fairly rigid approach developed in the communist era has retained its attractiveness due to its proven efficiency.

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KALEIDOSCOPE

New Nuclear Legislation in Hungary

The need for a revision of nuclear law of the former socialist States had been clearly seen prior to the political transformations of 1990. Still, the terrible tragedy of the Chernobyl accident must have occurred for public opinion to finally arrive at a conclusion that the national nuclear law in the former socialist state on the one hand, and the existing world wide international liability regime for nuclear damages, established by the 1963 Vienna Convention on Civil Liability for Nuclear Damage, on the other, cannot solve satisfactory the problem of adequate compensation of the victims of a potential nuclear accident.[1] Shocked by the Chernobyl accident the Board of Governors of the International Atomic Energy Agency put on the agenda of the revision of the 1963 Vienna Convention and the negotiations on the amendment of the Convention started in 1989. After more than eight years a Diplomatic Conference were held in Vienna which adopted not only a Protocol to amend the 1963 Vienna Convention but also an other treaty, the Convention on Supplementary Compensation for Nuclear Damage.[2]

In parallel with the negotiations in Vienna most Eastern and Central European States started to elaborate modern national nuclear legislation. It should be mentioned that in those countries nuclear law was not at the same level, some States had a rather developed and detailed legislation on the matter, in others very few norms were in force concerning different legal questions connected with the peaceful utilisation of nuclear energy. Even

1 PELZER, N.: Current problems of nuclear liability law in the post-Chernobyl-period. A German standpoint. *Nuclear Law Bulletin*, No. 39. and GONZALES, A.: The radiological health consequences of Chernobyl: the dilemma of causation. in: *Nuclear Accidents Liabilities and Guarantees*. OECD Paris, 1993. 25–55.

2 The Diplomatic Conference held between the 8 and 12 September 1997. The two Conventions were adopted by a two-third majority of those States present and voting.

in those States which had relatively developed nuclear law some fields were not regulated, or the existing legal norms were not in harmony with major international documents.[3] The elaboration of a domestic nuclear law fully in line with modern European laws has constituted a no small problem even in a country like Hungary, which enacted a comparatively developed nuclear law as far back as the early 1980s[4] and has tried to keep abreast with modern trends of legal development over the past 10 to 15 years.[5]

The first Hungarian Atomic Energy Act was adopted in 1980. That Act was a relatively modern legislation, it introduced the special third party liability regime for nuclear damages, before the enactment of that Act the damages caused to third parties by the use, production, transport, etc. of radioactive substances and preparations were to be compensated according to the rules of strict liability for hazardous activities contained in the Civil Code of 1959. The Act provided on the channelling of liability on the operator, on the absolute liability of the operator, on the prohibition of the exclusion or restriction of the operator's liability, etc.[6] At the same time, however, it failed to cover a number of questions on which the 1963 Vienna Convention contains express provisions. Thus, for instance, it was silent on liability for lost or stolen nuclear materials (Art. VI. para. 2. of the Vienna Convention), on the non-discrimination between victims

3 Cf. *Third Party Liability*, OECD NEA, 1990. 51–53., 69–75., 119–121., 179–188., 247–252.

4 The first step of nuclear legislation in Hungary goes back to the 1960s when the Government adopted the Decree No. 10 of 1964 relating radioactive substances and preparations. Provisions for the implementation and enforcement of the Decree were made by different ministerial orders enacted in agreement with the Hungarian Atomic Energy Commission. The 1964 Decree was in force until an act on atomic energy was adopted in 1980 (Act I. of 1980).

The preparations for an act on atomic energy was started practically in the same time when Hungary started to execute its nuclear program at the beginning of the 1970s. The agreement with the former USSR concerning the erection of a nuclear power plant in Hungary was concluded on the 28 December, 1966 and the construction work at Paks started in 1974. (Paks is a small town situated in the heart of Hungary 115 km south of Budapest on the right bank of the Danube river.) The four units of Paks Nuclear Power Plant are WWER–440\213 belonging to the second generation of Soviet-designed power stations; they were put into commercial operation between 1983 and 1987. (Paks–1 in August 1983, Paks–2 in November 1984, Paks–3 December 1986, Paks–4 November 1987.) The total installed capacity of Paks Nuclear Power Plant is 1760 MWe. In Hungary the nuclear power's share of electricity production is about 43%.

5 In 1989 Hungary acceded to the 1963 Vienna Convention Convention on Civil Liability for Nuclear Damage and to the 1988 Joint Protocol Relating to the Application of the Vienna Convention and the Paris Convention, which established a bridge between the 1963 Vienna Convention and the Convention on Third Party Liability in the Field of Nuclear Energy of 29 July 1960 (known as the Paris Convention), soon after its accession Hungary launched initiatives for framing a domestic law that would be in line with the Vienna Convention in every respect. See VON BUSEKIST, O.: A bridge between two Conventions on Civil Liability for Nuclear damage: the Joint Protocol relating to the Application of the Vienna Convention and the Paris Convention. *Nuclear Law Bulletin*, No. 43.

6 Cf. EÖRSI, Gy.: *A polgári jogi kártérítési felelősség kézikönyve.* (Manual on the compensation for civil liability), Közgazdasági és Jogi Könyvkiadó, Budapest, 1966. 280.

(Art. XIII. of the Vienna Convention),[7] on the upper limit of the operator's liability, or the non-inclusion in it of any interest or costs (Art.V. para 2. of the Vienna Convention) and so on. The above-mentioned shortcomings of Hungarian nuclear law became more evident after Hungary's accession to the Vienna Convention and to the Joint Protocol. As is know, in the domestic law of the majority of nuclear States the operator's liability is a specified amount, which, under the 1963 Vienna Convention, may not be less than 5 million US $ for any one nuclear incident. The Hungarian nuclear law contained no provision on such limit, which is to say the operator's liability was unlimited. The 1980 Atomic Energy Act did not mention any ceiling of the operator's financial liability, the general rules on compensation of the Civil Code had to apply which do not contain any limit of compensation for damages. At the time the 1980 Atomic Energy Act was adopted such unlimited nuclear liability was acceptable since, under the Act, the State had exclusive ownership of nuclear installations. It was not merely by legislation that, with its material resources, the State guaranteed payment of compensation for nuclear damage, but it referred claims of victims to the State Insurance Company, that time the only nation-wide state-owned insurance firm. The Act provided that claims of compensation for nuclear damage may be enforced against the organ designated by the Council of Ministers. Under the ordinance enforcing the Act,[8] compensation as stated above may be deemed exclusively from the State Insurance Company. However, this provision, which was in force until the 1 June 1997, had in fact been inapplicable for years, because the State Insurance Company was privatized years ago, with new insurance companies emerging in its place. As a matter of fact, the 1980 Act originally imposed an obligation on the State Insurance Company, but the latter never really had the necessary finance, for in case of a major nuclear incident the amount of compensation would certainly have been beyond its economic strength. So the money could only have been provided by reinsurance, which, however, the State Insurance Company had failed to maintain. Consequently the relevant provisions of the old Act did not in reality established any actual insurance relationship between the operator and the State Insurance Company, which in this respect was essentially a state firm destined to register eventual claims for compensation and to forward them to the Treasury.

The political change in Eastern Europe and the resultant more open political atmosphere have also entailed the impossibility for the governments of the States there to continue refusing to face and address problems arising from eventual accidents at nuclear installations. One can state that the political changes accelerated that process in the sense that no single responsible political force questioned the importance of modifying the legislation on the uses of nuclear energy and of approximating it to the nuclear laws of

7 The Act does not apply to all foreign victims even if the damage was entirely suffered in Hungary, since under the Act the compensation of foreigners depends on the existence either of an international agreement to which both Hungary and the home country of the victim are parties or the existence of reciprocity between the two States. All other foreign victims have the right for compensation only under the relevant provisions of the Civil Code.

8 Ordinance No. 12. of 1980 of the Council of Ministers.

the highly industrialized countries, but, on the other, it made it necessary to revise the whole fabric of domestic law of those countries, while the urgency of adopting certain laws that were more important from the point of view of daily politics delayed the elaboration of a new atomic energy act.[9]

It should be noted, however, that the elaboration of a new atomic energy act was also delayed in no small measure by the negotiations on the revision of the Vienna Convention.[10] In point of fact, the slow progress of the negotiations in Vienna for years, appeared to be a good pretext for some political personalities for postponing the decision concerning the revision of the Hungarian domestic law, suggesting that one should first wait till the Vienna Convention was amended and that the new domestic law of Hungary should be drafted in the light of the provisions of the "new" Vienna Convention. This was particularly true of questions like the concept of nuclear damage, the problem of environmental damage or the upper limit of liability for nuclear damage, which had given rise to a great deal of debate during the revision of the Vienna Convention as well.

After many years of elaboration it was only in 1996 that a comprehensive draft law on nuclear energy was finalized and was submitted by the Government to the Hungarian Parliament, which on 10 December 1996, adopted the new Atomic Energy Act (Act No. CXVI. of 1996). The Act entered into force on 1 June 1997, with the exception of the provisions on the Central Nuclear Financial Fund (Art. 62–62) which will enter into force half a year later, on 1 January 1998. The Act aims to regulate all activities connected with the peaceful utilisation of nuclear energy, with the exemption of some activities which due to the small extent of the risk involved do not create hazards to human life and health. Since the new Act in some respect is a legislative framework which sets forth the basic principles governing the peaceful use of nuclear energy, its enactment made necessary to adopt a series of new legislative provisions and to amend certain laws and regulations.

One of the foremost aims of the new Act is to create harmony between international treaties binding on Hungary and the domestic law and to formulate fundamental nuclear-law norms of a modern industrial State. In preparing the new regulation attention has also been paid to the fact that Hungary became a member of the Organization for Economic Co-operation and Development and its Nuclear Energy Agency in the summer of 1996. It should be added that already at the elaboration of the Act the Hungarian legislator followed with attention the ongoing negotiations in Vienna on the revision of the 1963

9 For that matter, e.g. in Hungary between 1990 and 1996 several ministerial regulations were adopted on questions relating to the uses of nuclear energy, but those rules do not cover but partial areas. By these regulations the legislator amended some decrees and filled the gaps in Hungarian nuclear law.

10 The negotiations on the revision of the Vienna Convention were started in 1989. Since that time till the Diplomatic Conference the Standing Committe on Nuclear Liability, set up by the Board of Governors of the IAEA to study the revision of the Vienna Convention, had 17 sessions, several intersessional working group meetings, and informal consultation meetings. On the revision of the Convention see WARREN, G. C.: Vienna Convention Revision: A Review of the exercise and the insurance implication in the provisions under discussion. *Nuclear Law Bulletin*, No. 55. 1995. 9–17.

Vienna Convention. As it was already mentioned after some months of the adoption of the new Atomic Energy Act a Diplomatic Conference was convened in Vienna to adopt a Protocol to amend the 1963 Vienna Convention and to adopt a new Convention on Supplementary Compensation for Nuclear Damage.[11]

The basic principles of the new Act are to protect the population against the hazards generated by the peaceful uses of nuclear energy, and to improve the safety of all nuclear activities.

The Act consists of six chapters and 68 articles.

The first chapter contains definitions, such as nuclear material, nuclear installation, nuclear wastes, etc. From legal point of view it is interesting to mention that the Act instead of the *operator* of nuclear installations uses the term of *"licensee"* who is the legal person possessing the licenses of competent authorities as required for nuclear activities. The definition of nuclear damage includes not only loss of life, health impairment, and damage to property, but also the costs of measures of reinstatement of the impaired environment arising concurrently with loss of life, health impairment or damage to property, it comprises also the costs connected with mitigation of damages and preventive measures, in both cases only the costs of reasonable and necessary actions are covered.

The second chapter is devoted to questions connected with regulation and control of nuclear activities. A great asset of the Act lies in the endeavour to make a clean sweep in the different spheres of competence and in the field of the licensing procedure.

According to the Act the Government is primary responsible for the control and supervision of the safe utilization of nuclear energy, by Art. 6. para.1. that governmental function is vested on to the Hungarian Atomic Energy Commission and to the Hungarian Atomic Energy Authority, as well as different ministries concerned. The Act envisages a preliminary consent of the Parliament for the construction of a new nuclear installation, including for the establishment of radioactive waste disposal facilities, and for the enlargement of an existing nuclear installation.

The Hungarian Atomic Energy Commission, headed by its President appointed by the Prime Minister, addresses the development of policy as well as overall co-ordination and monitoring of activities in the nuclear field. Other members of the Commission are designated by different Ministers, one can state that practically all Ministries are represented in the Commission.

The Hungarian Atomic Energy Authority is the central governmental organ dealing with the use of nuclear energy. With the exception of the questions connected with radiation safety, which is under the responsibility of the Minister of Public Welfare. The

11 Both instruments were opened for signature at IAEA headquareters from 29 September 1997. The Protocol shall enter into force three months after the date of deposit of the fifth instrument of ratification, acceptance or approuval. As regards the entry into force of the Convention on Supplementary Compensation for Nuclear Damage the situation is more complex since, according to Article XX of that Convention, there are two requirements: on the one hand at lest 5 States should deposit its instrument of ratification, and those States should have a minimum of 400,000 units of installed nuclear capacity, on the other.

principal responsibility of the Authority is to fulfil regulatory duties in connection with peaceful uses of atomic energy, with special emphasis on the safety of nuclear materials and facilities.[12]

The Nuclear Safety Directorate of the Authority is the nuclear safety regulatory body. The licensing procedure for nuclear activities is under the supervision of that Directorate which decides in the first instance, on licensing, inspection and enforcement matters. The appeals against the decisions of the Directorate should be submitted to the Director General of the Authority, whose decision is final and without appeal.[13] The Directorate has a wide competence it issues licences for nuclear activities, e.g. for construction, enlargement, decommissioning, shutdown, etc. of nuclear facilities; it is also responsible for technical radiation protection of nuclear equipment and is entitled to conduct quality inspections at licensees and suppliers' premises. In addition to defining the functions of different authorities the Act makes it clear, and confirms the stand, that the Nuclear Safety Directorate should be completely independent of the interests of producers, owners, suppliers of services, etc.

The substance of the system of administrative fora is that the licensing procedure and supervision connected with nuclear installations and equipment, registration of nuclear and radioactive materials, and the export and import of nuclear materials are within the competence of the Hungarian Atomic Energy Authority, whereas licensing and supervision connected with other facilities and installations relating to the uses of nuclear energy as well as with radiation safety and radioactive waste are within the competence of the Ministry of Public Welfare. Regulations concerning nuclear safety and radiation safety are within the purview of the Hungarian Atomic Energy Authority or the supervising minister and the Minister of Public Welfare, respectively. The conceptual basis of the licensing procedure is that in any procedure in which the Hungarian Atomic Energy Authority or the Minister of Public Welfare acts as the licensing authority the other organs of public administration cooperate as line authorities. Any substantive measure in respect to establishment of a new nuclear installation, acquisition of the right of ownership in an existing nuclear installation and transfer of use on any ground as well as to choice of site for storing radioactive waste is subject to the Government's prior consent. Of course, such consent does not replace the licenses to be subsequently obtained from different authorities.

Chapter V of the Act concentrates on liability issues. According to the Act the liability for nuclear damage is channelled to the licensee (operator) of the nuclear facility; in other words, liability for nuclear damage is borne by the legal person possessing the license of the competent authorities as required for the operation of a nuclear installation. The licensee's liability is strict and absolute, although the Act does not use the term of absolute

12 Ordinance No. 87. of 1997 of the Government made under the Act specifies the responsibilities and competences of both the Commission and the Authority. *Official Journal*, No. 46. of 1997.

13 See Ordinance No. 108. of 1997. on the Hungarian Atomic Energy Authority. *Official Journal*, No. 54. of 1997.

liability. The reason behind that solution is very simple, the Hungarian Civil Code does not use the term of "absolute liability" and instead of absolute liability it speaks about *special strict liability for hazardous activities*, and the new Act tries to be in line with that provisions of the Civil Code. The principle of absolute liability is reflected also in the provisions on exonerations. According to the Act the licensee is exempted from liability if the nuclear damage is the consequence of a nuclear incident directly triggered by an unavoidable external cause outside the scope of activity in the facility, armed conflict, war, civil war, armed uprising or a grave natural disaster of an extraordinary character (Art. 49.).

The ceiling of the licensee's liability is 100 million SDRs, in case of an incident in a nuclear power plant, but it will be much lower for incidents occurring during transportation of nuclear materials. If the amount of 100 million SDRs proves insufficient for compensation of all victims, an additional amount of 200 million SDRs will be paid by the State from public funds. These figures corresponds to some respect to the Protocol amending the Vienna Convention,[14] since according to the 1997 Protocol, the liability of the operator may be limited by the Installation State for any one nuclear incident either a) to not less than 300 million SDRs; or b) to not less than 150 million SDRs provided that in excess of that amount and up to at least 300 million SDRs public funds shall be made available by the Installation State. The Protocol provides a fazing in mechanism for a maximum of 15 years from the date of entry into force of the Protocol amending the Vienna Convention, to a transitional amount of not less than 100 million SDRs in respect of a nuclear incident occurring, provided that public funds shall be made available by that the Installation State to compensate nuclear damage between that lesser amount and 100 million SDRs. The amount of 300 million SDRs, inclusive the supplementary contribution of the State, provided in the new Hungarian Atomic Energy Act, corresponds to the above-mentioned provisions of the Protocol and as a consequence Hungary will ratify the Protocol without using the fazing in mechanism.

Following the world trends to increased emphasis on human environment, the Act regulates the question of environmental damage, some types of which it deems to be nuclear damage. Nevertheless, it does not ensure compensation for all environmental damage except in cases of damages to the environment arising concurrently, with loss of life, damage to the physical integrity and the health of persons and damage to property. These environmental damages and costs of reasonable measures of reinstatement of the environment (the costs related to all reasonable and required actions carried out for the mitigation or restoration of damages) are principles embodied in recent conventions connected with the protection of the environment, including the approach that the extent of compensation for environmental damage is essentially equal to the costs of reasonable restoration of the environment, are regarded by the Act as a yardstick for the compensation for environmental damages.

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14 See Consolidated Text of the Vienna Convention on Civil laibility for Nuclear Damage of 21 May 1963 as Amended by the Protocol of 12 September 1997. GOV/INF/822/Add. 1. Article V. para. 1. (a) and (b).

It is also in view of the rules of international law that the Act has incorporated the provision that the amounts of liability for nuclear damage do not include any interest and other costs likely to be incurred in connection with compensation. This provision is primarily intended to protect the interests of the victims, for the amount of compensation as defined by the Act, i.e. 300 million SDRs, is exclusively available for compensation of the victims and the costs connected with assessment of damage, registration of victims, judicial proceedings, etc. may not be paid from that amount.

The licensee is liable for nuclear damage involving lost, stolen, jettisoned or abandoned nuclear materials for a rather long period, one of 20 years to be counted from the date of the nuclear incident. The extinction period of liability for other nuclear damage is to be 10 years, double the period of prescription under tort law and much longer than that established for damages resulting from ultra hazardous activities. The victims may claim compensation within a 3 years limitation period, which starts on the date when the person suffering damage had knowledge or ought reasonably to have had knowledge of the damage and of the licensee liable for the damage. The licensee shall be exempt partly or wholly to pay compensation in respect of nuclear damage if it can prove that the damage suffered by the injured party resulted wholly or partly either from the gross negligence of the person suffering the damage or from an act or omission of such person done with intent to cause damage.

Some groups of damage are excluded from the special liability regime established by the Act and the licensee shall be liable for it in accordance with the Civil Code; such is the case, if the damage was caused to the nuclear facility itself or to any property on the site of that facility, which is used or intended to be used in connection with that facility, or to the means of transport upon which the given nuclear material was placed at the time of the nuclear incident.

The licensee is obliged to provide for insurance and other financial security up to the amount of 100 million SDRs for nuclear power plant. The insurer or financial guarantor may not suspend or cancel the insurance or financial security without giving notice in writing, at least two months in advance, of the suspension or cancellation to the Hungarian Atomic Energy Authority. In case of carriage of nuclear materials, the insurance or financial security may not be cancelled or suspended during the carriage of nuclear materials. Ordinance No. 227 of 1997[15] of the Government determines in detail the insurance of nuclear installations and the amount of financial security. As a consequence of these provisions on the insurance of nuclear third party liability, 11 Hungarian insurers representing the vast majority of Hungarian insurance market's non-life capacity established at the end of 1996 the Hungarian Nuclear Insurance Pool. The Pool is based on the fundamental principles common to all nuclear pools and organized and managed by the Hungaria Insurance Co. the largest in its field. The Hungarian Pool provides third party liability cover for the Paks Nuclear Power Plant in accordance with the new Atomic Energy Act.

15 *Official Journal*, No. 110. of 1997.

A separate chapter of the Act contains the rules on nuclear waste and spent fuel. In formulating them due account was taken of the safety standards elaborated within the frameworks of the IAEA.[16] The Act expressly states that the costs of the temporary and final disposal of nuclear wastes should be covered by the licensee. The Act regulates the shutdown of nuclear installations as well, it says that the licensee has to cover the cost of the commissioning of its nuclear installation.

The Act envisages establishing a Central Nuclear Financial Fund as a separate public fund. That Fund exclusively destined to finance the construction and operation of facilities for the final disposal of radioactive waste, the interim storage and final disposal of spent fuel, and the decommissioning of nuclear facilities. The financing of the Fund is intended to be secured from regular contributions by the licensees and from other appropriate sources. The Fund is managed by the Hungarian Atomic Energy Authority as a separate State fund (pursuant to Act No. XXXVIII. of 1992 on Public Finance).

As a conclusion it should be mention that Hungary was among the first States which signed the Protocol amending the Vienna Convention and its ratification is also envisaged. Although the new Atomic Energy Act took into consideration the on-going negotiations in Vienna, after the entry into force of the Protocol, with all probability the Act should be revised in order to make it in harmony with the new Vienna Convention.

Vanda Lamm

16 See; Joint Convention on the Safety of Spent Fuel Management and on the Safety of Radioactive Waste Management, *International Legal Materials*, 1997. No. 6.

Draft Constitution of the Republic of Hungary

Prepared by the Secretariat of the Parliamentary Committee for Drafting the Constitution

PREFACE

IN SUMMER 1994, after the second general elections in Hungary following the beginning of the transition to pluralist democracy and market economy, the newly formed socialist-liberal coalition government adopted in its programme the elaboration of a new Constitution which would replace the Constitution in force, which, albeit substantially new, still bears the unpleasant name Act No. XX. from the the more irritating year 1949.

The constitution-making process started first under the supervision of the Minister of Justice, and later in June 1995 by its resolution No. 63 1995, Parliament established an *ad hoc* Parliamentary Committee with the task to produce a draft of the new Constitution, under the chairmanship of the Speaker of Parliament. That Committee which included four deputies from each parliamentary party, and has been assisted by many experts after long debates adopted a document called the 'Concepcion of the new Hungarian Constitution' containing the principal contents of the new Constitution; this document was approved by Parliament in its resolution No. 119/1996 on December 21, 1996. Already from the beginning of this process, foreign scholars and experts have displayed a good deal of interest in the constitution-making process and this is the reason why the Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences took the initiative to publish this booklet.

The present publication encompasses the edited and revised version of the draft elaborated by the Secretariat of the Parliamentary Committee lead by Dr István Somogyvári. Although it is based on the conception adopted by Parliament, it should not be regarded as an official document of Parliament nor as necessarily reflecting the views of the Parliamentary Drafting Committee. It is noteworthy that the Parliamentary Committee agreed at the outset of its work that the text of the Constitution in force should be retained if there is no overwhelming majority in the committee to change it. For this reason, the draft has retained the text and formulations of the present Constitution in

many cases. The texts set in *italics* were added by the drafters as a suggestion based on expert opinion as emerged during the discussions of the earlier versions of the draft without being based on the conception adopted by the resolution of Parliament of December 1996.

Critical comments and suggestions for improvement of the text will certainly be useful for the constitution-making process in Hungary.

Budapest, May 16 1997

Notes of the translator: The parts of the text marked by square brackets ([...]) are added in the translation to make the reading of the text more legible and understandable to the reader; thus they do not form part of the Draft. Since Hungarian language does not express gender differences, the personal pronouns 'he or she' were used randomly throughout the translation. In order to avoid possible confusion, the word 'state' used in the sense of 'political unit' was capitalised, while other uses of it were not.

[PREAMBLE]

THE PEOPLE OF HUNGARY, inspired by the constitutional traditions of Hungary, symbolised also by the Holy Crown [of St. Stephen] and

by the universal values of constitutionalism,

reaffirming the thousand years continuity of the State of Hungary,

SOLEMNLY DECLARE their will to establish a democratic State based on the rule of law,

to guarantee and protect human and civil rights in the spirit of liberty, equality and fraternity,

to reassert national sovereignty in harmony with the principle of the equality and peaceful co-operation among nations.

WITH THESE IN MIND, respecting the will of Hungarian citizens,

Parliament [hereby] adopts the Constitution of the Republic of Hungary.

PART I
GENERAL PROVISIONS

Chapter I
FUNDAMENTAL PROVISIONS

Form of government and official name of the State

Article 1

1. The official name of the Hungarian State is 'Republic of Hungary'.

2. The Republic of Hungary shall be an independent, democratic State based on the rule of law.

3. The Republic of Hungary shall be a social State, committed to social values; its primary concern is to promote the economic and cultural welfare of citizens.

Sovereignty

Article 2

Variant A

All power of the State emanates from and belongs to the people; the people shall exercise its power on the basis of the Constitution through elected representatives and in cases determined by statute through referendum.

Variant B

1. All power shall emanate from and belong to the people, which shall exercise its power through organs and institutions established in accordance with the Constitution.

2. *Elections to Parliament and the referendums shall be held on the basis of universal, equal and direct suffrage by secret ballot.*

Article 3

Variant A

1. Parliament may in an international treaty transfer legislative, executive or judicial powers defined by the Constitution—except the power to modify the Constitution—to international organisations or institutions of which the Republic of Hungary is a member.

2. Delegation of powers referred to in para. 1 shall be made by the two-thirds of the votes cast of the deputies; it shall be submitted to referendum.

Variant B

If the Republic of Hungary becomes member of an international organisation or institution entailing the transfer of legislative, executive or judicial powers as defined by the Constitution, the conclusion of the instrument of accession shall be proposed by the two-thirds majority of the votes cast in favour by all the deputies; it shall be confirmed by referendum.

Constitutional principles and objectives

Article 4

1. The State shall recognise and protect the inalienable, and inviolable fundamental human rights.

2. The State shall respect and promote fundamental rights.

Article 5

1. The powers of the State shall be divided between its organs.

2. Organs of the State shall exercise their powers in accordance with the Constitution and the statutes adopted under it, respecting legal security.

3. No State organ shall interfere with the powers of other organs.

Article 6

Nobody, including social organisations, State organs or individuals shall engage in any activity directed towards seizure or exercise of power by force or its exclusive possession. Everyone has the right and the duty to resist such aspirations in accordance with the law.

Article 7

1. Political democracy is based on pluralism and popular elections regularly held.

2. Political parties shall function freely subject to the respect of the Constitution and the statutes; they shall respect the principles of democracy.

3. Political parties participate in the formation and expression of the will of the people.

4. Political parties shall in no way exercise the authority of the State.

5. *Political parties are obliged to publish a statement of their financial resources and their spending.*

Article 8

1. The State shall promote co-operation between the Government, and the business and economic organisations and trade unions; it shall promote the organisational framework of that co-operation.

2. A separate statute settles the framework and procedure of the co-operation between social partners.

Article 9

1. The Republic of Hungary renounces war as a means of settling disputes between nations and shall refrain from the use or threat of force against the independence or territorial integrity of other States.

2. The Republic of Hungary seeks co-operation with all peoples of the world as well as with all democratic countries and international organisations.

3. The Republic of Hungary participates in the maintenance of international peace and security.

Article 10

The Republic of Hungary feels itself responsible for the Hungarians living beyond its borders. It shall promote the protection of their rights and interests as well as the cultivation of their mother tongue, national culture, and ties with Hungary, as a matter of an important duty of the [Hungarian] State in both bilateral and multilateral international relations.

Article 11

1. National and ethnic minorities living in the Republic of Hungary are constitutive members of the State; they are participating in the power of the people.

2. The State shall protect the rights of the national and ethnic minorities living in its territory.

Article 12

The Republic of Hungary shall protect marriage and family and shall devote a particular measure of care to children's security of existence, education and training.

The territory of the State

Article 13

1. *The territory of the Republic of Hungary shall form a unity; it shall be indivisible and inviolable.* The State shall defend the territorial integrity of the country.

2. The national territory shall be divided into the capital city, counties, towns and villages. The capital city shall be divided into districts. A different territorial division may also be established by statute.

3. The capital of Hungary shall be Budapest.

4. The conditions for obtaining town and village status, the designation and seat of the counties, as well as of the towns and villages belonging to them, shall be determined by statute.

Citizenship

Article 14

1. Hungarian citizenship may be acquired by birth, change in the family status, naturalisation and renaturalisation.

2. A person confessing herself to be of Hungarian nationality and having [at least one] ascendant of Hungarian citizenship [at any time], shall enjoy more favourable conditions for naturalisation [than persons not being ethnic Hungarians].

3. No one shall be arbitrarily deprived of Hungarian citizenship and of the right to change citizenship.

4. Citizenship, its acquisition and termination shall be regulated by statute.

Article 15

1. The Republic of Hungary shall protect the rights and legitimate interests of Hungarian citizens abroad.

2. No Hungarian citizen shall be extradited to another State or an international authority except in the cases and the manner specified by statute or international treaty.

Article 16

1. Political and social rights of Hungarian citizens domiciled outside the territory of the State as well as their military duties may be regulated by statute differently from those of citizens domiciled within the territory of the country.

2. No discrimination among Hungarian citizens shall be made on the ground of the mode of acquisition of the citizenship and, unless otherwise provided by statute, of being citizens of a foreign State [dual citizenship].

3. Election or appointment of persons having [together with the Hungarian] dual or multiple citizenship to specific public positions may be restricted or prohibited by statute.

State symbols and holidays

Article 17

1. The national anthem of the Republic of Hungary shall be Ferenc Kölcsey's poem entitled 'Himnusz' with the music composed by Ferenc Erkel.

2. *The flag of the Republic of Hungary shall consist of three horizontal stripes of equal width, the upper stripe to be red, the middle one to be white and the lower one to be green.*

3. *The coat of arms of the Republic of Hungary shall be a shield, divided into two parts, with a pointed base, four horizontal red stripes alternating with four silver ones in the left section, a silver double cross standing in the rising middle part, with a golden crown, of a green triple mount in the red section on the right, with the Holy Crown of Hungary resting on the shield.*

4. The protection and use of the State symbols of the Republic of Hungary shall be regulated by statute.

Article 18

1. The national holidays of the Republic of Hungary shall be

(a) March 15, in commemoration of the revolution and war of independence of 1848–49;

(b) August 20, in commemoration of the foundation of the State, the day of King St. Stephen, the founder of the State;

(c) October 23, in commemoration of the revolution and fight for freedom of 1956.

2. The official State Day shall be determined by statute.

PART II
HUMAN AND CIVIL RIGHTS

Chapter II
GENERAL RULES ON FUNDAMENTAL RIGHTS

Regulation of fundamental rights

Article 19

The human and civil rights (henceforth fundamental rights) laid down in the Constitution shall be regulated by statute.

Exercise of fundamental rights

Article 20

1. The fundamental rights shall be exercised on the basis of respect for the fundamental rights of others, in good faith and in accordance with their purpose.

2. Fundamental rights, in accordance with their nature, and legal protection against their violation shall also be enjoyed, in the manner defined by statute, by legal persons and organisations not possessing legal personality (henceforth referred to jointly as legal persons).

3. Everyone may lawfully protect her fundamental rights and, in case of their violation, may seek legal remedy before the court or other law enforcement organ.

Equality of rights and equality before the law

Article 21

1. All persons shall have legal capacity and shall be equal before the law.

2. No one shall be subject to discrimination of any kind, such as on the ground of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

3. The rights of aliens may be regulated differently from those of Hungarian citizens.

Chapter III
THE [FUNDAMENTAL] RIGHTS AND THEIR GUARANTEES

Right to life and human dignity

Article 22

1. Every human being shall have the inherent right to life and human dignity.

2. No one shall be arbitrarily deprived of her life. *The right to life may be interfered with on the basis of a statute.*

3. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment violating human dignity.

4. No one shall be subjected to medical or scientific experiment without her consent.

Personal freedom

Article 23

1. No one shall be arrested or detained or otherwise deprived of his liberty except on such grounds and in accordance with such procedure as established by statute.

2. Anyone arrested, detained or otherwise deprived of his liberty shall be brought promptly, but not later than seventy-two hours, before a court of law, or shall be released. The court shall hear the person brought before it and shall decide in written reasoned decision without delay on his release or to uphold the deprivation of liberty.

3. Unlawfully arrested or detained persons shall have a right to full compensation.

Article 24

1. No one shall be required to perform forced or compulsory labour.

2. The duty of persons convicted for criminal offence to perform work, or the obligation to work in case of emergency for the purposes and in the manner determined by statute shall not be deemed to violate the prohibition stated in para. 1.

Freedom of movement

Article 25

1. Every Hungarian citizen and everyone staying lawfully within the territory of Hungary shall have liberty of movement and freedom to choose his place of residence and to leave the country. This right may be restricted by statute.

2. A Hungarian citizen may return from abroad to Hungary at any time.

3. No Hungarian citizen shall be expelled from the territory of the Republic of Hungary.

4. An alien staying lawfully in the territory of Hungary may be expelled from the country only in pursuance of a decision rendered in accordance with a statute.

Personality rights and protection of personal data

Article 26

1. Everyone shall have personality rights, in particular the right to good reputation, the right to privacy, the inviolability of his home and correspondence.

2. Everyone shall be free to dispose of her personal data and of any information received.

3. The rights set forth in this Article may be restricted by statute. Persons performing public functions may be subject to more severe restrictions in the interest of public morality.

Right of access to data of public interest

Article 27

1. Everyone shall have access to data of public interest.

2. Access to data of public interest may be restricted by statute in the case of classified information, provided that the possession of them strongly prejudices or imperils the interests of the Republic of Hungary in national defence, crime control and crime prevention, maintenance of public order, national security, central [government's] financial or foreign policy, foreign affairs or international relations, and propriety of administration of justice.

Freedom of conscience and religion

Article 28

1. The State shall recognise and protect the freedom of conscience and religion. This freedom includes the right to have or adopt a religion or belief of one's own choice, and the freedom, either individually or in community with others, to manifest, or not to manifest, one's religion in belief on worship, observance, practice or teaching.

2. Churches shall be separated from the State; the State shall be neutral in religious and philosophical matters.

3. The State shall recognise and guarantee the independence and autonomy of the churches.

Freedom of expression and freedom of the press

Article 29

1. Everyone shall have the right of express her opinion in speech, in press or in any other way of communication. Censorship is forbidden.

2. Propaganda for war and incitement to national, racial or religious hatred, and discrimination, hostility or violence is forbidden.

3. The freedom of expression may be restricted by statute in view of the protection of minors (henceforth children).

4. *The court may prohibit the publication of any expression if it violates the constitutional order, the personal rights of others or their right to personal data, the restrictive rules adopted for the protection of children, and the prohibition stated in para. 2.*

5. The press, the radio, the television and the news agencies shall provide balanced, accurate and objective information.

Freedom of assembly

Article 30

1. Everyone shall have the right to peaceful assembly.

2. The statute [regulating the exercise of the fredom of assembly] may

(a) make assembly on a public place subject to prior notification;

(b) prohibit assembly in certain places;

(c) make the holding of the assembly conditional upon compliance with requirements relating to public order, national security, public health or environmental protection.

Freedom of association

Article 31

1. Everyone shall have the right to associate with others, including the right to form or join associations or other voluntary organisations.

2. Establishment of an armed organisation or an organisation the activity of which offends against the constitutional order shall be prohibited.

3. The freedom of association of aliens may be restricted or made subject to conditions by statute.

Right to participate in public affairs

Article 32

Every Hungarian citizen shall have the right to take part in the conduct of public affairs and to access to public service on the basis of his skill, qualification and professional knowledge in conformity with the conditions set forth in statute.

Right to petition and complaint

Article 33

1. Everyone shall have the right to submit, individually or in community with others, written petitions or complaints to State organs.

2. They shall, within the time limit set by statute, respond to the petition or complaint on its merits.

Rights relating to judicial, administrative and other procedures

Article 34

1. Everyone shall have the right to access to court in order to protect her rights or lawful interests.

2. The State shall, in the manner defined by statute, bear the costs, wholly or in part, of legal procedures, including lawyers fees, of persons without sufficient means.

Article 35

1. Everyone shall have the right to a fair hearing in a lawsuit by an independent and impartial court of law established by statute which shall decide, within a reasonable time, on her rights and obligations, as well as on any criminal charges against him.

2. No one may be removed from the jurisdiction of her lawful judge.

Article 36

1. No one shall be held guilty of, and be punished for, any criminal offence on account of any act or omission which did not constitute a criminal offence at the time when it was committed.

2. The criminal punishment applied shall be determined exclusively by statute. In no case shall be more severe penalty imposed than that applicable at the moment of the commission of the criminal offence.

3. No one shall be held guilty of any criminal offence until his criminal responsibility has been established in a final judgement of a court of law.

4. No one shall be prosecuted or punished for an offence for which he has already been finally convicted or acquitted in Hungary.

Article 37

1. Everyone accused with a criminal offence shall have the right to defence in each stage of the procedure.

2. The accused and counsel shall have the right to be informed of the charge and of the evidence upon which it is based.

3. Counsel shall not be held responsible for any opinion expressed in defence of the accused.

Article 38

1. Any party to a court procedure shall have the right to be heard in person by the court. An exception to this rule may be established by statute.

2. If the party renounces of the right or fails to exercise it in reasonable time, the court may decide without hearing the party.

Article 39

1. Everyone shall be entitled to seek legal remedy, as defined by statute, against a judgement of a court or decisions of administrative or other authorities (henceforth referred to jointly as authorities) violating or allegedly violating the law.

2. Everyone shall be entitled to legal representation in procedures before the authorities.

3. Any party to a procedure before the authorities shall have the right to use a language which she understands. Unless otherwise provided by statute, the costs of interpretation and translation shall be borne by the authority.

Minority rights

Article 40

1. The State shall guarantee the right of citizens belonging to national and ethnic minorities living in the territory of the country to participate in public life individually and collectively, the right to protect and promote their culture, maintain their institutions, use their mother tongue in public life and administration, be educated in their mother tongue, and use their names in their own language.

2. A separate statute shall guarantee the right to representation for citizens belonging to national and ethnic minorities.

Right of asylum

Article 41

1. The Republic of Hungary shall grant asylum to aliens or stateless persons who, in accordance with international treaties or by virtue of a statute are refugees, as well as to other persons recognised as refugees [on other grounds].

2. No person enjoying asylum shall be returned or expelled from the territory of Hungary or be extradited to any State save in exceptional cases specified by international treaty and with lawful procedure.

Right to property and the right to inherit

Article 42

1. Everyone shall have the right to property and to inherit.

2. Everyone shall be free to dispose of her property.

3. The scope of the State's exclusive and permanent ownership shall be determined by statute.

4. No limitation on the right to property and no restriction on its exercise shall be imposed except in the public interest and in the cases and the manner specified by statute.

5. Property shall not be expropriated save exceptionally and exclusively in public interest and in the cases and the manner specified by statute; expropriation is allowed only with full, unconditional and prompt compensation.

6. The property and use of agricultural land may be subject to specific regulation by statute.

Freedom of enterprise and freedom of economic competition

Article 43

1. The Republic of Hungary shall recognise and protect the freedom of enterprise and the freedom of economic competition.

2. The scope of activity reserved to the State shall be determined in statute.

3. A statute may restrict the freedom of enterprise and freedom of economic competition in order to protect consumers, to control unfair competition, and to prevent of monopolies.

Right to work and to holiday

Article 44

1. Everyone shall have the right to the free choice of employment and occupation as well as to healthy, safe and reasonable conditions of work.

2. With a view to implementation of the rights contained in para. 1 the State shall promote the highest possible rate of employment and, in the interest of employees shall

(a) regulate the rights of employees;

(b) determine the health and safety requirements at workplace;

(c) establish minimum wages;

(d) operate job placement and retraining systems.

3. Employees shall have the right to rest and leisure; to this end, the State shall regulate the working time, periodic paid holidays, and remuneration for official holidays.

Right to form trade unions and other professional associations and right to strike

Article 45

1. Everyone shall have the right to form or to join associations or trade unions to defend his economic interests.

2. The State shall guarantee the right to establish employee organisations and trade unions and accordingly recognise the right of everyone to exercise the right to strike under the conditions specified by statute.

Right to living conditions appropriate to human beings, to health and to social security

Article 46

1. It shall be a duty of the State to ensure living conditions appropriate to human beings.

2. Citizens shall be entitled to health care. Its scope and manner of provision shall be determined by statute.

3. Citizens shall have the right to social security, to support for a livelihood in the event of old age, sickness, disability, widowhood and orphanhood.

Article 47

1. The principal source of primary health care and social benefits shall be constituted by citizens' compulsory contribution to the social security scheme, with the assessable income for and the extent of, as well as exemptions from, such contribution to be determined by statute.

2. The State shall maintain or support health care and social welfare institutions and shall contribute to the provision of social insurance benefits due to citizens under statute.

3. There may be operated private insurance schemes.

4. The State shall support healthy way of life and physical training.

Article 48

Persons of impaired and physically or mentally handicapped condition shall be entitled to special protection. With a view to implementation of this right, the State shall provide for them material support and increased protection under labour law, and shall maintain and support institutions of rehabilitation and education.

Article 49

1. Everyone shall have the right to a healthy environment.

2. The State shall take measures to preserve the natural and man-made environment as well as to prevent and reduce environmental damage.

3. It shall be a duty of everyone to preserve the environment.

Article 50

The State shall not reduce the legally guaranteed level of health protection, social security and environmental protection except when such measure is inevitable in the interest of implementing other fundamental rights or in the public interest, the reduction in the level of protection to be proportional, even in such cases, to the objective pursued.

Rights relating to education, scientific research, culture and cultural activities

Article 51

1. The State shall recognise and support the freedom of education and instruction.

2. Primary education shall be compulsory. The age limit for children's compulsory school attendance shall be prescribed by statute.

3. During the period of compulsory schooling, education in the State owned educational institutions shall be free.

4. Everyone shall have access to secondary and higher education on the basis of capacity. Everyone shall be entitled to obtain professional qualification.

5. Everyone shall be free to attend an educational institution of her own choice.

6. Teachers shall be free to express their convictions in accordance with the rules governing the freedom of expression.

Article 52

1. Institutions of primary and secondary education may be founded by anyone, while institutions of higher education may be established by such organisations as are determined by statute.

2. The State shall maintain institutions of primary education within easy reach of children.

3. The State shall maintain institutions of secondary and higher education, and it shall provide support, as determined by statute for educational institutions maintained by others.

4. The State shall exercise professional and financial control over the educational institutions.

Article 53

1. The State shall recognise the freedom of scientific research, art and culture.

2. Intellectual property shall be protected by the law.

3. The protection and support of the national and universal values of science, art, culture and sports (including those of the national and ethnic minorities), and the protection of the Hungarian language shall be a responsibility of the State; which shall perform it primarily by legal regulation, by support for the preservation and enrichment of those values, and by operating of appropriate institutions.

Right to found a family

Article 54

1. Any man and any woman who have reached the age limit determined by statute may contract a marriage and found a family.

2. The spouses shall have equal rights both during marriage and in case of its dissolution.

Rights of the child

Article 55

1. Children shall be entitled to increased protection and care by the family, society and the State.

2. The State shall guarantee the child's right to have a citizenship, be registered, bear a name, be brought up in a family, and express her wish, in a manner appropriate

to her age, in respect to matters affecting her fate, and shall take care for children without a family.

3. The parents shall be free to choose the education and training appropriate to the child.

Chapter IV
RESTRICTION OF FUNDAMENTAL RIGHTS

General principles governing the restriction of fundamental rights

Article 56

1. The rules restricting fundamental rights shall be laid down by the Constitution or, if authorised by the Constitution, in statute.

2. Fundamental rights may be restricted by statutory regulations only *exceptionally*, to the extent absolutely necessary in proportion to the goal pursued and without prejudice to their essential content, in *particular* if restriction is necessary for the protection of the fundamental rights of others, in the interests of crime prevention and control, public order, national security and public health, for the protection of the environment or in the interest of proportionate bearing of public charges.

Derogation from fundamental rights in emergency situations

Article 57

1. In a state of emergency declared in accordance with the Constitution, the exercise of fundamental rights may be suspended or regulated in a manner different from the general rules, to the absolutely necessary extent and in close connection with the exigencies of the situation.

2. Paragraph 1 shall not apply in any case to the prohibition of deprivation of citizenship, to equal rights and equality before the law, and to the rights stated in Articles 22, 23 (3), 28, 37 and 39 (2).

Restrictions by reason of profession

Article 58

Variant A

1. Members of the Constitutional Court (henceforth constitutional judges), judges, public prosecutors, the President and the Vice-President of the State Audit Office, and

the professional members of the Hungarian Armed Forces, Frontier Guards, the police and the national security services

(a) shall not be member of a political party;

(b) shall not engage in public activities in or on behalf of a political party; and

(c) may exercise the rights of assembly and association subject to conditions specified in statute.

2. The parliamentary commissioners and public servants shall not engage in public activities in or on behalf of a political party.

3. A statute may make the exercise by public servants and public employees as well as by the professional members of the military and police organs of their right to form trade unions and to strike subject to specified conditions.

Variant B

Membership in a political party of, political activity by, and the exercise of rights of association, assembly and strike of the members of the Constitutional Court (henceforth constitutional judges), judges, public prosecutors, parliamentary commissioners, the President and the Vice-President of the State Audit Office, and the professional members of the Hungarian Armed Forces, the Frontier Guards, the police and the national security services may be prohibited by statute.

PART III
LEGAL SYSTEM

Chapter V
LEGAL NORMS

Fundamental rules

Article 59

1. The legal system of the Republic of Hungary is based upon the Constitution.

2. Legal norms may be made by the organs vested with law-making powers by the Constitution with the designation and the content defined by the Constitution.

3. *Norms issued by international organisations or institutions if they are obligatory for Hungary and directly applicable, are to be regarded as norms of Hungarian law.*

Article 60

1. The following [kinds of] legal norms shall be adopted by the [following] law-making organs:

(a) statute by Parliament;

(b) ordinance by the Government;

(c) ordinance by the ministers and other members of the Government (henceforth referred to jointly in this part as ministers);

(d) regulation by the President of the Hungarian National Bank;

(e) by-law by the local self-government (henceforth referred to in this Part as self-governments).

Article 61

Variant A

No legal norm may be contrary to the Constitution, ordinances to statutes, and ministerial ordinances to government ordinances.

Variant B

No legal norm shall be contrary to the Constitution, ordinances to statutes, and ordinances of ministers, ordinances of the President of the Hungarian National Bank, and by-laws of self-governments to government ordinances.

Statutes

Article 62

1. If a fundamental social relationships or legal institution is to be regulated by statute under the Constitution, its content, safeguards and limitations shall be [exclusively] regulated by statute (henceforth exclusive subject-matter of legislation).

2. In matters falling within the exclusive subject-matters of legislation, ordinances may contain rules for the execution of the statute within the limits of the authorisation given in the statute [itself].

3. Parliament may adopt statutes on any subject-matter not falling within the exclusive subject-matters of legislation.

Government ordinances

Article 63

Government may issue ordinances

(a) without special authorisation in subject matters not regulated by statutes, within the limits of its competence;

(b) upon authorisation given in a statute and within the limits contained therein to establish detailed rules for the execution of the statute.

[Central] Bank regulations

Article 64

The President of the Hungarian National Bank may, within his competence defined by Article 145 para. 3, issue regulations

(a) without special authorisation in subject-matters not regulated in a statute;

(b) upon special authorisation given in statute to lay down detailed rules for the execution of the statute.

Ministerial ordinances

Article 65

Ministers may, within the limits of their competence, issue ordinances if authorised to do so by a statute or by an ordinance of the government.

By-laws of self-governments

Article 66

The self-governments may issue by-laws,

(a) within their competence without special authorisation, in matters not regulated by statute *or government ordinance;*

(b) within the limits of the authorisation given in a statute in order to lay down detailed rules for the execution of the statute appropriate to local conditions.

Force of legal norms

Article 67

1. Legal norms shall be binding to

(a) natural and legal persons in the territory of the Hungarian State;

(b) all Hungarian citizens domiciled or staying abroad.

2. Legal norms shall be binding upon the territory of the Hungarian State; by-laws of self-governments shall be binding within the confines of their [territorial] jurisdiction.

3. No legal norm may create obligations nor declare any conduct to be unlawful for a time preceding its entry into force.

Publication of legal norms

Article 68

1. With the exception of the by-laws of self-governments, all legal norms shall be promulgated in *Magyar Közlöny*, the Official Gazette of the Republic of Hungary.

2. The by-laws of self-governments shall be promulgated in their own official journals or made public in any other way locally customary.

Regulation of law-making

Article 69

The detailed rules relative to *general legal instruments other then legal norms*, official journals, and official collections of the legal norms shall be laid down in statute.

Chapter VI
LEGISLATIVE PROCEDURE

Bills

Article 70

1. A statute may be proposed by the Government or by any deputy.

2. Fifty thousand citizens may propose the adoption of a statute in the form of a bill in any subject-matter, except those excluded from referendum.

3. The details of the popular initiative shall be laid down in statute.

Legislative drafting by committees

Article 71

Variant A

1. The standing committees of Parliament shall take part in the drafting of bills by

(a) discussing bills;

(b) submitting motions for amendments to bills;

(c) making recommendations for Parliament concerning its decision on the adoption of statute.

2. The Parliamentary drafting of bills may be assisted by *ad hoc* committees and sub-committees of standing committees.

Variant B

Article 71 to be omitted.

Adoption of statutes

Article 72

Parliament shall adopt statutes by simple majority (para. 2 of Article 89); in cases defined by the Constitution the adoption of a statute requires at least two-thirds of the votes cast by the deputies present and voting (henceforth qualified majority).

Promulgation of statutes

Article 73

1. Bills voted by Parliament shall be signed by the Speaker, who shall transmit them to the President of the Republic.

2. The President of the Republic shall sign the statute within fifteen days of receipt or, upon the request of urgency by the Speaker, within five days, and shall proceed to promulgate it immediately.

Article 74

1. In cases where the President of the Republic disagrees with a statute or any provision thereof, he shall, within the time limit set in Article 73 return it with a statement of reasons to Parliament for consideration.

2. Parliament shall debate [*de novo*] the bill and vote again on its adoption. [If the vote is again in favour of the statute] the President of the Republic shall sign the statute, transmitted to him by the Speaker, within five days and shall proceed to promulgate it immediately.

Article 75

1. If the President of the Republic is of the opinion that a statute or a provision thereof is contrary to the Constitution, he shall, within the time limit set in Article 73 submit with a statement of the reasons the statute to the Constitutional Court for decision.

2. The Constitutional Court shall decide in priority.

3. If the Constitutional Court declared the statute [bill] unconstitutional, the President of the Republic shall return it to Parliament which shall proceed in accordance with Article 7 (2).

4. If the Constitutional Court declares the statute or its provision concerned conform to the Constitution, the President of the Republic shall, within five days of receipt thereof, sign the statute and shall proceed to promulgate it immediately.

Chapter VII
RELATIONSHIP BETWEEN INTERNATIONAL LAW AND HUNGARIAN LAW

Harmonisation of international law and Hungarian law

Article 76

The Republic of Hungary shall accept the generally recognised rules of international law and shall ensure the conformity of Hungarian law with its obligations assumed under international law.

Conclusion of international treaties

Article 77

1. International treaties shall be prepared by the Government.

2. An international treaty becomes binding on the Republic of Hungary upon its confirmation by Parliament or the President of the Republic, or upon its approval by the Government.

3. International treaties confirmed by Parliament shall be promulgated by a statute; other international treaties shall be promulgated by government ordinance.

Article 78

Parliament shall confirm the conclusion of international treaties governing subject-matters regulated by statute or those of paramount importance to the foreign relations and the constitutional order of the Republic of Hungary, in particular if their content

(a) affects questions concerning a state of war or conclusion of a peace treaty, employment of the Hungarian Armed Forces and Frontier Guards for acts of war, the borders or the territory of the State;

(b) concerns accession to a military or political organisation;

(c) entails a considerable unplanned financial obligation for the budget.

Article 79

1. The President of the Republic shall have the power to ratify international treaties which require ratification by virtue of their content or by the will of the contracting parties, but are not within the competence of Parliament.

2. If the President of the Republic disagrees with an international treaty submitted to him to ratification, he shall return it with a statement of reasons to the Government within fifteen days for reconsideration. The President of the Republic shall proceed to ratify the treaty transmitted to him again by the Government.

Article 80

1. International treaties not subject to ratification shall be approved by the Government.

2. The rules of procedure for the conclusion of international treaties shall be laid down by statute.

Control of the constitutionality of international treaties

Article 81

1. Examination by the Constitutional Court of the constitutionality of an international treaty to be concluded may be proposed by Parliament, its standing committee, the President of the Republic—within fifteen days of its transmission to him for ratification—and the Government.

2. If the Constitutional Court has declared the international treaty unconstitutional the treaty shall not be concluded until the organ responsible for its conclusion has eliminated unconstitutionality.

PART IV
THE STATE

Chapter VIII
ELECTIONS

Suffrage

Article 82

1. Every adult Hungarian national shall have the right to vote.

2. Any person who

(a) is under guardianship restricting or excluding his capacity for action;

(b) has been barred by a final judicial decision from participating in public affairs;

(c) is serving a prison sentence;

(d) has been committed in criminal procedure to compulsory medical treatment shall be disqualified from the franchise.

3. Every Hungarian national having the right to vote (henceforth elector) shall, but for para. 4, have the right to be elected.

4. Electors living abroad and not domiciled in Hungary shall not have the right to be elected.

Article 83

1. *The right to vote shall be exercised in person.*

2. *Exercise of the right to vote shall be free.*

3. *Electors shall have equal rights and shall be subject to no distinction on the grounds stated in Article 21 (2) or on any other ground.*

4. The participation in elections of any elector living abroad not domiciled in Hungary or temporarily staying abroad on the day of election may be regulated differently [from the general rules] by statute.

Election of deputies

Article 84

1. *Candidates for deputies shall obtain mandates on the basis of the majority principle in individual constituencies and on the basis of the principle of proportionality on party lists. At least one half of the mandates shall be obtained on party lists.*

2. *The boundaries of constituencies and the number of obtainable mandates shall be determined in a statute.*

3. *Individual constituencies shall be established by taking into account the equality of suffrage, the administrative boundaries, and the national, religious and historical peculiarities.*

4. *Lists may be drawn up by political parties under the conditions specified by statute.*

5. *Mandates on a party list may be obtained by the political party having obtained the legally established threshold which shall not exceed five percent of the votes cast.*

Regulation of elections

Article 85

1. *The election of deputies, self-government representatives, burgomasters and the Chief Burgomaster of the capital city, self-government representatives of national and ethnic minorities as well as the electoral procedure shall be governed by separate statute.*

2. *No statute concerning elections shall enter into force before the first day of the seventh month following the day of its promulgation.*

3. *The statute on the election of deputies shall be adopted by Parliament by a qualified majority of votes.*

Chapter IX
PARLIAMENT

Article 86

1. Parliament shall *represent the people of Hungary*, exercise the legislative power on the basis of the Constitution and the statutes as well as in representation of the electorate, control the executive power and make use of the sovereign rights of the people transferred to it.

2. Within its functions defined in para. 1, Parliament

(a) adopts the Constitution;

(b) makes statutes;

(c) decrees national referendum;

(d) ratifies international treaties;

(e) decides on the employment of the Hungarian Armed Forces and Frontier Guards outside or inside the country;

(f) decides on the entry of foreign military forces into the territory of Hungary;

(g) decides on the declaration of a state of war and the conclusion of peace;

(h) declares state of emergency and state of necessity;

(i) approves the central budget and the appropriation accounts;

(j) dissolves the representative organ of local self-governments functioning contrary to the Constitution (*in case of Variant A, Article 160[4]*);

(k) elects the officers as determined by the Constitution and by the statutes, and decides on the termination of their mandates;

(l) accords amnesty.

Constitution and functioning of Parliament

Article 87

1. The first meeting of Parliament shall be convened by the President of the Republic within one month to election day [at latest]. Parliament shall be deemed to be constituted upon the verification of the mandates of deputies.

2. Parliament shall meet in regular sessions twice a year from February 1 to June 15 and from September 1 to December 15.

3. At the written demand of the President of the Republic, the Government or one-fifth of the deputies, Parliament shall meet in extraordinary session or meeting; the

demand shall indicate the reasons for convocation together with the proposed date and agenda.

4. The Speaker shall convoke the sessions and meetings of Parliament.

5. The President of the Republic may adjourn Parliament's session not more than once for thirty days during a session. In the course of the period of adjournment, the Speaker shall convene Parliament at the written request of one-fifth of the deputies within eight days of receipt thereof.

Article 88

1. Parliament's standing orders and conduct of business shall be established by the *Statute on the* Rules of Procedure, which shall be adopted by a qualified majority of votes. *The President of the Republic shall not exercise his prerogatives stated in Articles 74 and 75 in respect to the Rules of Procedure.*

2. The meetings of Parliament shall be public. *The rules on admission to the House of Parliament and its session room as well those on the stay there shall be laid down by the Rules of Procedure.*

3. At the request of the President of the Republic, the Government or any deputy, Parliament may decide, by a qualified majority of votes, to hold a meeting *in camera* for the protection of State secrets or of personal data not to be made public.

Article 89

1. The presence of more than one half of the deputies shall constitute the quorum.

2. Parliament shall adopt its decisions by the votes cast in favour by more than one half of the deputies present and voting. The Constitution and the Rules of Procedure may make the adoption of certain decisions subject to a greater number of votes in favour.

3. At the proposal of the Government or at least one-fifth of the deputies, Parliament shall hold a political debate.

Organisation of Parliament

Article 90

1. Parliament shall elect a Speaker, Deputy Speakers and Recording Officers from among the deputies.

2. Deputies belonging to the same political party may set up a parliamentary group to co-ordinate their parliamentary activity.

Article 91

1. After it has been constituted, Parliament shall establish standing committees and may set up *ad hoc* committees and commissions of inquiry functioning as temporary committees.

Variant A

2. At least one member of each parliamentary group shall sit on the standing committees. The number of deputies from each group participating in the work of a standing committee as its member shall be proportional to the number of deputies in the different groups, but Parliament may depart from this rule in favour of the parliamentary groups of the opposition.

Variant B

Para. 2 to be omitted.

3. A commission of inquiry shall be set up on the proposal of at least one-fifth of the deputies.

4. Authorities, institutions and citizens shall supply data as required by parliamentary committees or, upon request, shall appear and give testimony before those committees.

Termination of Parliament's term

Article 92

1. Parliament's term shall be four years from its election.

2. Parliament may dissolve itself before the expiry of its mandate.

3. The President of the Republic may dissolve Parliament if

(a) Parliament on at least four occasions within twelve months withdrew confidence from the Government; or

(b) in case of termination of the Government's mandate, it failed to elect a new Prime Minister within forty days.

4. Before dissolving Parliament, the President of the Republic shall consult the Prime Minister, the Speaker of Parliament, and the leaders of the parliamentary groups.

5. The President of the Republic shall call parliamentary elections simultaneously with dissolving Parliament.

6. *Dissolution of Parliament shall be of immediate effect.*

Article 93

1. A new Parliament shall be elected in the same month in which the mandate of the former Parliament expires.

2. If Parliament's term is terminated before its expiry, the new Parliament shall be elected within three months of the date of the decision on the former's dissolution.

Legal position of deputies

Article 94

1. Deputies shall not be instructed in their quality of deputy; they shall exercise their mandate in the public interest.

2. A deputy may not be

(a) President of the Republic;

(b) constitutional judge;

(c) parliamentary commissioner;

(d) President or Vice-President of the State Audit Office, or an auditor thereof;

(e) judge, public prosecutor;

(f) public servant, except a member of the Government and a Parliamentary Secretary of State;

(g) professional member of the armed forces, the police and other similar organisations.

3. Cases of incompatibility of deputies other than those enumerated in para. 2 may also be defined by statute.

4. Deputies shall be entitled to remuneration guaranteeing their independence as well as to reimbursement of expenses and to specified benefits; the detailed rules to be laid down in a statute.

Article 95

1. Deputies shall enjoy immunity from the day of their election.

2. Deputies and former deputies shall not be held responsible for their vote cast, facts alleged or opinions expressed in exercise of their mandate. This immunity shall not apply to violation of State secrets, defamation or libel, and responsibility in civil law.

3. No deputy shall be detained or prosecuted, nor shall any contravention procedure be instituted or any coercive police measure be taken against them without the consent of Parliament, unless apprehended during the commission of the criminal act.

4. Further details of the immunities of the deputies shall be regulated by statute.

Article 96

1. The mandate of a deputy shall terminate upon

(a) termination of the Parliament's term of office;

(b) termination of the right to vote of the deputy;

(c) resignation;

(d) establishment of incompatibility of the deputy.

2. A deputy may by a declaration addressed to Parliament resign her mandate.

3. On the incompatibility of deputies Parliament decides.

Article 97

1. Each deputy may interpellate and address question to members of Government and the Chief Public Prosecutor, and may address question to the parliamentary commissioners, the President of the State Audit Office and the President of the Hungarian National Bank, in any matter within their competence.

2. *Each interpellation or question shall be answered—in writing, if so requested by the interpellator—at the meeting of Parliament.*

National referendum

Article 98

1. National referendum (henceforth referred to in this Chapter as referendum) may be held in matters within the competence of Parliament either as mandatory referendum or as consultative referendum.

2. The result of a mandatory referendum shall bind Parliament; the conditions for the validity of voting and result of referendums shall be determined by statute.

3. The consultative referendum serves to know the opinion of citizens before a decision is made by Parliament.

4. There shall be no referendum on

(a) the State budget and its implementation, taxes and duties, customs duties, and statutes establishing conditions for local taxation;

(b) elections of officials within the competence of Parliament;

(c) obligations based on international law;

(d) the dissolution of Parliament;

(e) declaration of the state of war, a state of emergency and a state of necessity;

(f) employment of the Hungarian Armed Forces and Frontier Guards outside or inside the country.

5. The prohibition under para. 4 (c) shall not apply to approval or rejection by referendum of acceptance *pro futuro* of obligations under international treaties affecting State sovereignty, or to prolongation of expired international treaties.

Article 99

1. Organisation of a referendum may be proposed by

(a) the President of the Republic,

(b) the Government,

(c) at least fifty deputies,

(d) at least 300,000 citizens having the right to vote.

2. Electors may propose [only] a referendum to repeal a statute, except the Constitution, or the statutes directly executing the provisions of the Constitution. The statute on referendums may set a time limit for the collection of signatures required for submission of a proposal to hold a referendum.

3. It shall be obligatory to organise the referendum

(a) if it is proposed against a statute to modify the Constitution not yet in force *(in case of Variant A in Article 193);*

(b) on any international treaty under which the Republic of Hungary transfers a part of its legislative, executive or judicial powers to an international organisation;

(c) if it is proposed by 300,000 citizens having the right to vote.

4. In cases set out in para. 3 the referendum shall be ordered by the President of the Republic and it shall be mandatory. In any other case the referendum shall be consultative and it shall be ordered by Parliament.

Chapter X
THE PRESIDENT OF THE REPUBLIC

Legal position of the President of the Republic

Article 100

1. The head of State of the Republic of Hungary shall be the President of the Republic who expresses national unity and shall be the custodian of the democratic functioning of the State.

2. The President of the Republic shall be the supreme commander of the Hungarian Armed Forces.

3. The person of the President of the Republic shall be inviolable; his protection in criminal law shall be guaranteed by statute.

Article 101

1. The office of the President of the Republic shall be incompatible with any other state, political and economic occupation or office. The President of the Republic shall not engage in any other lucrative occupation and shall not accept fee or remuneration for any other activity except those under copyright protection.

2. Before taking office the President of the Republic shall eliminate incompatibilities.

Article 102

1. In accordance with a statute the President of the Republic shall be entitled to *personal protection*, remuneration, reimbursement of expenses, and benefits. *All these remunerations, benefits shall be due to him even after the termination of his office except when his mandate is terminated by removal from office or upon establishment of incompatibility.*

2. *The President of the Republic shall be assisted in his work by an office.*

Functions of the President of the Republic

Article 103

1. The President of the Republic

(a) represents the Republic of Hungary;

(b) may address message to Parliament;

(c) may participate and at the meetings of Parliament;

(d) calls parliamentary and general local self-government elections;

(e) appoints on the proposal of the Prime Minister the members of the Government and the Secretaries of State;

(f) ratifies on the Government's proposal international treaties within his competence;

(g) appoints, accredits and receives ambassadors, envoys, and consuls-general;

(h) appoints on the proposal of the minister the professors of State owned universities and confirms in their posts the rectors of State owned universities, the directors-general of State owned colleges, and the President of the Hungarian Academy of Sciences; appoints and promotes the generals;

(i) decides on the proposal of the minister on conferring town rank, and under separate statute on other matters concerning administrative division of the national territory;

(j) exercises individual pardon on the minister's proposal;

(k) on the proposal of the minister, decides on the acquisition and termination of Hungarian citizenship;

(l) confers awards, prizes, titles, orders and distinctions established by statute, and authorises the wearing of foreign State distinctions;

(m) decides in matters referred to his competence by statute.

2. The powers of the President of the Republic to appoint and to accreditations includes the power to release from office and removal from duty; those to confer distinctions and to authorise wearing them shall include revocation in accordance with conditions laid down in by statute.

Article 104

1. All decisions of the President of the Republic set out in para. 1 of Article 103 shall, except for subparagraphs (a) to (d), require for their validity the countersignature of the Prime Minister or a member of the Government.

2. The President of the Republic shall decide within thirty days on the proposals submitted to him unless another time limit is set by statute.

3. *The President of the Republic shall reject a proposal submitted to him if*

(a) *it fails to meet the statutory requirements of submission; or*

(b) *he has reasonable ground to believe that the acceptance of it is likely to disturb gravely the democratic functioning of the State organisation.*

Election of the President of the Republic

Article 105

1. The President of the Republic shall be elected by Parliament for a term of four years.

2. Any elector who has completed thirty-five years of age before the election day shall be eligible to be elected President of the Republic.

3. The President of the Republic shall be eligible for reelection to this office for one more term only.

4. The President of the Republic shall be elected at least thirty days before the expiry of the term of the President in office or, if the latter's term terminated before its expiry, within thirty days of its termination.

5. The date of presidential election shall be fixed by the Speaker of Parliament.

Article 106

1. The election of the President of the Republic shall be preceded by nomination.

2. The written recommendation of at least fifty deputies shall be required for a valid nomination.

3. Nominations shall be submitted to the Speaker of Parliament before the election is ordered.

4. Each deputy may recommend one candidate only; if a deputy recommended more than one candidate, each of his recommendations shall be invalid.

Article 107

1. Parliament shall elect the President of the Republic by secret ballot. In the first ballot the candidate who received two-thirds of the votes cast by all the deputies in his favour shall be elected President of the Republic.

2. If no candidate obtains the majority of votes as defined in para. 1 in the first ballot, another ballot shall be ordered. Votes may only be cast for the two candidates who obtained the highest number of votes in the first ballot. The person who has obtained the two-thirds of the votes of all the deputies shall be elected President of the Republic.

3. If the second ballot was unsuccessful, the President of the Republic shall be elected in a third ballot by the votes in favour of more than one-half of all the deputies.

4. The voting shall take place in no more than three consecutive days.

Article 108

1. If the ballot under para. 3 of Article 107 was unsuccessful, a new election shall be held on the basis of repeated nomination.

2. The new election may take place on the eighth day following the day of the last unsuccessful ballot.

Article 109

The person elected President the Republic shall take office on the expiry of the former President's term or, if the latter's term terminated before its expiry, on the eighth day following the publication of the results of election; in assuming office he shall take an oath before Parliament.

Substitution of the President of the Republic

Article 110

1. In cases where the President of the Republic is temporarily hindered in performing his office or his term has terminated, his powers shall, until the new President takes up his duties, be exercised by the Speaker of Parliament subject to the folloving restrictions: the Speaker

(a) shall not return any statute to Parliament for consideration or to submit to the Constitutional Court for review;

(b) shall not dissolve Parliament;

(c) shall not exercise the power of pardon, except in the case of persons sentenced by a final judgement of a court.

2. While acting as a substitute for the President of the Republic, the Speaker of Parliament shall not exercise his rights as deputy and his functions shall be performed by a Deputy Speaker designated by Parliament for that purpose.

Termination of the President's term

Article 111

1. The President's term shall terminate upon

(a) the expiry of its term of office;

(b) the occurrence of a condition rendering [the President] incapable to perform his functions for more than ninety days;

(c) the establishment of incompatibility;

(d) resignation;

(e) removal from office.

2. The existence of the condition stated in para. 1 shall be established by Parliament at the motion of one-fifth of the deputies.

3. If the question of incompatibility of the President of the Republic during his term, Parliament on the motion of one-fifth of deputies shall decide.

4. In the cases referred to in paras. 2 and 3, the resolution shall require the votes in favour cast by two-thirds of all the deputies. The vote shall be by secret ballot.

5. The President of the Republic may, by a declaration addressed to Parliament, resign from his office. The resignation shall be valid upon its acceptance by Parliament. Within fifteen days Parliament may invite the President of the Republic to reconsider his decision. If the President of the Republic upholds his resignation, Parliament shall not refuse to accept it.

6. The President of the Republic may be removed of his office, if during its performance he has intentionally violated the Constitution or the statutes.

Responsibility of the President of the Republic

Article 112

1. One-fifth of the deputies may initiate the calling to responsibility of the President of the Republic pursuant to para. 6 of Article 111.

2. The institution of procedure shall require the votes in favour of two-thirds of votes in favour by all the deputies. It shall be decided by secret ballot.

3. The President of the Republic shall not exercise his functions from the adoption of Parliament's decision until the termination of the procedure.

4. The President's acts violating the Constitution or other statute shall be judged by the Constitutional Court.

5. If, as a result of the procedure, the Constitutional Court establishes the fact of violation of the Constitution or other statute, it may remove the President of his office.

Article 113

1. If, pursuant to Article 112, procedure against the President of the Republic have been instituted for a criminal act committed during his term of office in connection with his official duties, the procedure before the Constitutional Court shall also be governed by the rules of criminal procedure. The case shall be pleaded by a commissioner for impeachment elected from among the deputies.

2. Until after his mandate has terminated, criminal procedure against the President of the Republic shall not be instituted for acts other than those mentioned in para. 1.

3. If the Constitutional Court establishes the President's culpability in the commission of an intentional criminal offence, it shall remove him of his office and may impose any punishment and [punitive] measure determined by the Penal Code for the act in question.

Chapter XI
GOVERNMENT AND PUBLIC ADMINISTRATION

Members of the Government

Article 114

1. The Government shall consist of the Prime Minister and the ministers.

2. The Prime Minister shall direct the work of the Government and shall be responsible for it.

3. The Prime Minister may propose the appointment of one or more Deputy Prime Minister(s) and ministers without portfolio, whose appointment to the Government shall not derogate from the Prime Minister's responsibility and powers.

4. The Prime Minister shall be substituted by a member of the Government designated by him.

Article 115

1. The Deputy Prime Minister(s) and the ministers (henceforth referred to jointly as ministers) shall, under the guidance of the Prime Minister and in accordance with the legal norms, conduct independently the branch of public administration within their competence, direct the administration organs subordinated to them and discharge tasks determined by the Government or assigned to them by the Prime Minister.

2. Attached to the ministers there shall be Secretaries of State.

3. The ministries shall be enumerated in a statute.

Formation of the Government

Article 116

1. The Prime Minister shall be elected by the votes of more than the half of the deputies.

2. The Prime Minister shall be proposed by the President of the Republic.

3. In case of an unsuccessful vote, another person shall be proposed by the President of the Republic.

Article 117

1. Ministers shall be appointed and dismissed by the President of the Republic upon the proposal of the Prime Minister.

2. The Government shall be formed upon appointment of the ministers. As the Government has been formed, its members shall take an oath before Parliament.

3. The Prime Minister shall present the program of the Government to Parliament within thirty days of the Government's formation.

Functions of the Government

Article 118

1. The Government shall be the head of the executive power.

2. In accordance with the Constitution and the statutes the Government shall determine the general policy of the state, execute the Constitution and the statutes and, with the exceptions defined by statutes, direct the public administration.

Article 119

In the exercise of its functions, the Government

(a) may set up organs of public administration;

(b) shall determine the functions of the ministers and the administrative organs under its direction;

(c) may appoint government commissioners for the discharge of specific functions and set up decision-making, preparatory, advisory and control committees or other bodies;

(d) *may examine the activity of any organ of public and self-government administration (henceforth referred to jointly as organs of public administration) and request data on, account of or explanation about it;*

(e) *may, where appropriate, draw to its own competence any case from any administrative organ under its direction in any matter and may annul any decision of any such organ.*

Relationship between the Government and Parliament

Article 120

1. The Government shall be responsible to Parliament *and shall have its confidence.*

2. The ministers [members of the Government] may attend and have the right to be heard at the meetings of Parliament and its committees.

3. Parliament and any of its committees may require any member of the Government to attend their meeting.

4. The legal status and remuneration of the members of the Government as well as reimbursement of their expenses and the benefits due to them shall be regulated by statute.

Termination of the Government' tenure of office

Article 121

1. The Government's tenure of office shall terminate upon the termination of the Prime Minister's tenure of office.

2. The Prime Minister's terms of office shall terminate upon

(a) the assembly of a newly elected Parliament;

(b) his resignation;

(c) expression of the lack of confidence towards him.

3. Upon termination of its mandate the Government shall remain in office until the formation of a new Government, but it shall not possess the power to approve international treaties, and may issue ordinances only in cases of urgency pursuant to an explicit enabling provision given by a statute.

Vote of confidence

Article 122

1. One-fifth of the deputies may submit to Parliament a written motion of non-confidence in the Prime Minister. The motion shall designate the person proposed for the office of Prime Minister.

2. Once Parliament has expressed lack of confidence in the Prime Minister [in office], the person proposed in the motion as new Prime Minister shall be deemed to have been elected. If the vote of confidence was unsuccessful, a new motion of non-confidence may not be submitted only after three months lapsed.

3. The Prime Minister may request a vote of confidence or may request that the vote over a bill be at the same time a vote of confidence.

4. Parliament shall decide on a motion of non-confidence or that of confidence by the votes in favour of more than the half of all the deputies.

5. A debate and a vote over the motion shall not be held sooner than three days from and not later than eight days after its submission.

Public administration

Article 123

1. Rights and duties concerning matters of public administration shall not be established except by virtue of and under a procedure determined by a statute or other legal norm. The rules of administrative procedure shall be laid down in a statute.

2. Organs of public administration are obliged to act in any matter within their competence and [territorial] jurisdiction.

3. No case within its competence shall be withdrawn from any organ of public administration except pursuant to Article 119 (e).

4. Organs of public administration may be controlled by citizens in observance of the rules relative to the protection of official secrets and personal data.

Public servants

Article 124

1. Every public servant shall have individual tasks and responsibilities in public administration.

2. Public servants shall act impartially in accordance with the law.

3. Unless otherwise provided in statute, civil servants shall be appointed and employed on the basis of open competition for an unspecified term.

4. Public servants may be dismissed on grounds and in a procedure determined by statute.

5. The legal status and the remuneration of civil servants shall be regulated by statute.

Chapter XII
ADMINISTRATION OF JUSTIC

Principles governing the administration of justice

Article 125

1. Justice in the Republic of Hungary shall be administered solely and exclusively by courts of law.

2. Courts shall decide in criminal cases, civil disputes and other matters referred in a statute to their competence; unless otherwise provided in a statute, courts of law shall have the power to review administrative decisions.

Article 126

1. Judicial power shall be independent of other powers.

2. Judges shall decide solely on the basis of the legal norms and in accordance with their conscience and conviction. They shall not be instructed and may not accept instructions.

3. The costs of the judicial organisation shall be supplied by the central budget in a separate item.

Article 127

1. Courts of law shall deliver their judgements in the name of the Republic of Hungary. Judicial decisions shall be binding on everybody.

2. Court hearings shall be public unless otherwise provided in a statute.

3. Any means of proof likely to lead to the establishment of the facts of the case may be used freely as evidence in judicial procedure; the courts shall be free to take notice of any evidence separately as well as taken together, appraising them in accordance with their inner conviction.

Article 128

1. Courts of law shall administer justice in trial courts consisting of at least three judges, unless otherwise provided by statute.

2. Non-professional [lay] judges may also participate in the administration of justice in the matters and in the manner specified by statute.

3. Only a professional judge may act as single judge or presiding judge of a trial court.

Judicial organisation

Article 129

1. The judicial organisation shall be determined by statute. A statute may establish special courts to hear specific group of cases. No extraordinary court shall be set up.

2. Establishment, merger and abolition of courts shall be within the competence of Parliament.

Supreme Court

Article 130

1. The Supreme Court shall be the highest judicial organ of the Republic of Hungary.

2. The Supreme Court shall guarantee unity in the application of law by the courts; its directives to ensure unity of the case law shall be obligatory to all courts of law.

3. The President of the Supreme Court shall be elected for a term of six years from among the judges by Parliament on the proposal of the President of the Republic, by a two-thirds majority of votes of all the deputies in favour.

4. The cases of the termination of the office of the President of the Supreme Court shall be defined in statute.

Variant A

5. The Vice-President of the Supreme Court shall be appointed from among the judges by the President of the Republic for a term of six years, in accordance with the conditions set out by a separate statute.

Variant B

Para. 5 to be omitted.

Judges

Article 131

1. Judges shall be appointed for an unlimited period, and be relieved from office, by the President of the Republic.

2. The office of a judge shall be incompatible with any other State, political and economic office or occupation.

3. Judges shall not engage in any professional activity except for scholarly, literary or other artistic, educational activities and creation of works protected by copyright law.

4. Except *in flagrante delicto*, detention of a judge, institution of criminal or administrative procedure and taking of coercive police measures against her shall be subject to the prior consent of the organ entitled to appoint or elect her.

5. Judges shall be entitled to a remuneration ensuring their independence; its amount shall be determined by statute.

Article 132

1. A judge shall not, apart from dismissal on disciplinary grounds, without her consent be relieved or suspended from her office or set in retirement except upon proposal of the competent body of judges and upon grounds specified in statute.

2. No judge shall be transferred to another court except with her consent, save if otherwise provided by statute.

3. The [compulsory] retirement age of judges shall be determined in statute.

Article 133

1. Judges may form organs of self-government which shall have the power to give opinion and consent in cases specified in statute.

2. The statute on the organisation and administration of courts as well as organs of self-government and the status of judges shall be adopted by a qualified majority; rules of judicial procedure shall be defined by statute.

Functions of the public prosecutor

Article 134

1. The public prosecutor shall prosecute in criminal affairs, take action in the cases and manner specified by statute against other unlawful acts and omissions, and promote the prevention of violations of law.

2. In performing his functions, the public prosecutor

(a) exercises the powers defined by statute in criminal investigations;

(b) represents the prosecution in judicial procedure;

(c) supervises the legality of the execution of criminal punishments;

(d) initiates, if authorised in a statute in cases of violation of law, judicial procedure in civil and administrative cases or takes part in procedures and makes use of legal remedies if the person concerned is unable to defend his rights, or if such remedy is required in the public interest;

(e) takes action in matters within his competence to prevent or terminate violations of law.

The Chief Public Prosecutor

Article 135

1. The Chief Public Prosecutor of the Republic of Hungary shall be elected on the proposal of the President of the Republic by Parliament with a two-thirds majority of votes cast in favour of all the deputies for a term of six years.

2. The Chief Public Prosecutor shall be responsible to Parliament and shall render account to it of his activity at periods specified in a statute.

3. The Chief Public Prosecutor shall not be instructed by Parliament and shall not be interpellated on pending cases.

4. *The cases in which the Chief Public Prosecutor's term of office shall be terminated shall be determined in statute.*

Variant A

5. The deputies of the Chief Public Prosecutor shall be appointed on the latter's proposal, in accordance with a statute by the President of the Republic for a period of six years.

Variant B

Para. 5 to be omitted.

Organs of the public prosecution

Article 136

1. Public prosecution shall be an autonomous organ of the State subject but to the legal norms.

2. The organs of the public prosecution shall be directed and controlled by the Chief Public Prosecutor.

3. Public prosecutors shall be subordinated to the Chief Public Prosecutor and shall not be instructed except by the Chief Public Prosecutor and by the superior public prosecutors. Instructions may be given to prosecute in court and on the of exercise the public prosecutor's powers; the public prosecutor may not be instructed, however, to drop or set off prosecution.

4. Public prosecutors shall be appointed and dismissed, and their service terminated by the Chief Public Prosecutor in accordance with a statute.

5. Detailed rules on public prosecutors, the organisation of the prosecution, the status and remuneration of public prosecutors shall be laid down by statute.

Chapter XIII
PUBLIC FINANCE

Currency system

Article 137

The currency system of the State shall be established by Parliament in a statute ensuring the security of money owners and that of the circulation of money.

Public revenues and expenditures

Article 138

1. The central State organs, the local self-governments, the separate public funds and the social security funds shall administer the assets entrusted to them in a responsible manner and on the basis of budgets for calendar years.

2. Budgets shall comprise all revenues and expenditures in itemised breakdowns and in aggregates in a uniform accounting system.

3. Data concerning implementation of budgets, draft budgetary plans and appropriation accounts, budgetary balances, and information upon which they are based shall be published upon their submission to Parliament and the representative organs of local self-governments.

4. The administration and use of public revenues and expenditure shall be regulated by statute.

Article 139

1. Parliament shall determine in statute the budgets of the central State organs (henceforth the central budget), the budgets of social security funds and adopt the reports on the implementation of the budgets. The respective bills as well as the proposed amounts and uses of the revenues and expenditures of separate State funds shall be submitted to Parliament by the Government within the time limits established by the Constitution or by statute.

2. Local self-governments shall in a by-law adopt their budgets upon the adoption of the central budget in accordance with its requirements, taking into account the central financial assistance and the grants they receive from the central budget.

Equality in bearing public charges

Article 140

1. Persons and organisations shall contribute to meeting public needs by paying taxes, charges, customs duties and other dues on the ground of their participation in economic transactions and in accordance with their income, financial situation and capacity to bear

burdens, as well as by paying fees charged for certain public services (henceforth referred to jointly as rates and taxes), the extent of such contribution to be established in such a way as not to imperil the subsistence of individuals and the operational capacity of organisations.

2. The forms of paying rates and taxes, the scope of persons obligated for such payment, the basis of assessment for and the scale of payments, exemptions and allowances shall be determined by statute and, within the limits set by statute, in by-laws of self-government; their entry into force shall be set in such a way as to leave appropriate time for individuals and organisations for preparation.

Central budget

Article 141

1. By distribution of revenues from rates and taxes, the central budget shall provide for the financial conditions for the implementation of fundamental rights and for the functioning of the State's organisational system and institutions, while securing, in the cases specified in statute, the material resources for the discharge by self-governments of their mandatory functions, and shall promote the development of the national economy.

2. The bill containing the central budget for the following year shall be submitted to Parliament by the Government at least ninety days before the expiry of the budget for the current year.

3. In adopting the central budget, Parliament shall, in case of a budgetary deficit, determine which part of the deficit can be financed from internal or external borrowing. In addition to the items approved in the central budget, adoption of any measure to increase the public debt or assumption of commitments leading to the increase of public debt shall be subject to authorisation of Parliament passed by a qualified majority of votes.

Article 142

1. If Parliament had not adopted the central budget before January 1 of the fiscal year, the Government shall, within thirty days, submit to Parliament a bill on the interim administration of finances.

2. In the statute on interim finances Parliament shall authorise the Government to collect the revenues and incur the expenditures determined therein.

3. The statute on interim finances shall cease to be in force on the day of the entry into force of the new budget but in any case not later than the last day of the sixth month following its adoption.

4. Before the adoption of the statute on interim finances, or if it lost effect before the entry into force of the statute on the new budget, the Government shall be entitled

to collect the revenues determined by legal norms [in force] and, within the limits of the credits accorded the budget for the preceding year, to incur the expenditures proportionate to the time lapsed.

Article 143

1. Government shall, within eight months following the end of the fiscal year, submit to Parliament a report on the implementation of the budget in the same structure and comparable with that of the budget, together with the statement the State Audit Office.

2. Parliament shall adopt the implementation report in the form of a statute before the end of the tenth month following the end of the fiscal year.

3. The Government shall propose to Parliament a vote of confidence if Parliament has refused to adopt the statute on interim finances or the implementation report.

4. The rules governing the elaboration and implementation of the central budget shall be laid down in statute.

State Audit Office

Article 144

1. The State Audit Office shall be the control organ of Parliament; it shall be the supreme organ of financial and economic control vested with general powers; it shall perform its functions in subordination but to the statutes.

2. The State Audit Office shall control the legality and efficiency of

(a) the administration of public revenues, the State budget and the implementation accounts;

(b) the utilisation budgetary resources outside public finances;

(c) the management of State property.

3. Functions may be assigned to and competences vested in the State Audit Office only by the statute governing its [organisation and competence].

4. The State Audit Office shall report to Parliament on its control activities; the reports shall be published taking into account the rules on the protection of official secrets and personal data.

5. The President and Vice-President of the State Audit Office shall be elected by Parliament by a two-thirds majority of votes in favour of all the deputies for a term of twelve years.

6. The organisation and functioning of the State Audit Office as well as the status and remuneration of auditors shall be governed by separate statute.

Hungarian National Bank

Article 145

1. The Hungarian National Bank shall be the bank authorised to issue banknotes and to coin money of the Republic of Hungary, the central bank of the national economy; it shall be owned by the State.

2. Within the framework of the statute governing it and in accordance with the Government's economic policy, the Hungarian National Bank as central bank shall act in independence to adopt its money supply policy and to devise the instruments thereof in order to contribute to maintaining the equilibrium of the economy.

3. In the manner defined in statute, the Hungarian National Bank shall

(a) have the exclusive right to issue the national currency;

(b) protect the internal and external purchasing power of the national currency;

(c) regulate money circulation;

(d) devise the national accounting and payments system.

4. President of the Hungarian National Bank shall, on the proposal of the Prime Minister, be appointed by the President of the Republic for a term of six years.

5. The President of the Hungarian National Bank shall render annual account to Parliament on the Bank's activity.

6. The organisation and functioning of the Hungarian National Bank shall be governed by statute.

State property

Article 146

1. State shall own and administer the property necessary for the performance of its functions.

2. The State shall be the owner of the property requiring increased protection and care of salient importance.

3. The exercise of the rights relating to State property shall be regulated in statute.

Chapter XIV
ARMED FORCES AND ORGANS OF LAW ENFORCEMENT

General rules

Article 147

1. The functions relating to national defence, defence of public order and national security, and defence against catastrophes (henceforth referred to jointly as military and policing functions) shall be performed by the following organs:

(a) the Hungarian Armed Forces (henceforth the Armed Forces);

(b) the Frontier Guards;

(c) the Police;

(d) the national security services.

2. Policing and other organs not mentioned in para. 1 may also collaborate in the performance of military and policing functions.

3. *The military and policing organs shall be directed by the Government in the manner defined in statute. The statute may confer the right of direction on a member of the Government designated for that purpose.*

4. *The President of the Republic shall participate in the direction of the Armed Forces.*

5. *Parliament shall exercise continuous control over the activities of the military and policing organs.*

6. Separate statutes shall regulate

(a) the national defence and the Armed Forces;

(b) the Frontier Guards, the Police and the national security services;

(c) policing organs other than those enumerated in para. (b).

Armed Forces

Article 148

1. The military defence of the country shall be the duty of the Armed Forces.

2. In accordance with the rules relating to emergency situations, the Armed Forces shall collaborate in

(a) putting an end to armed actions aimed at overthrowing the constitutional order or seizure of exclusive power and imperilling personal safety and material security on a large scale, so that police action proves insufficient to cope with it;

(b) averting and removing the consequences of catastrophes.

Frontier Guards

Article 149

1. The function of the Frontier Guards shall be to maintain order at the State frontiers.

2. The Frontier Guards shall collaborate in the military defence of the country.

Police

Article 150

The Police shall *prevent*, detect and hinder crime and defend public order.

National security services

Article 151

The national security services shall have the following functions:

(a) to disclose and avert disguised efforts prejudicing or endangering national sovereignty and the country's political, economic and military interests;

(b) to obtain data and information, of foreign origin or destined for use abroad, fostering the country's interests and necessary for government decisions;

(c) to disclose and avert disguised efforts at changing or disturbing by unlawful means the constitutional order and the functioning of constitutional institutions.

Consent to the crossing of the State frontiers

Article 152

1. Units of the Armed Forces or the Frontier Guards shall not cross the frontiers of the Hungarian State without the prior consent of Parliament.

2. The prohibition stated in para. 1 shall not apply to

(a) military manoeuvres conducted under international treaties;

(b) peace-keeping operations at the request of the United Nations.

3. Unless otherwise provided by international treaty, the armed forces of foreign States shall not move through, and shall not be employed or stationed in the territory of the Hungarian State without the prior consent of Parliament.

Article 153

1. Notwithstanding the provisions of Article 152, the Government may, in the cases defined by statute authorise, for purposes of manoeuvres or exercising or for other purposes of co-operation between military organs,

(a) a unit of the Armed Forces or the Frontier Guards, of a strength and with equipment as defined in statute to cross the Hungarian State frontiers; or

(b) a unit of the armed forces of a foreign country, of a similar strength and with similar equipment, to enter the territory of the Hungarian State.

2. The Government shall immediately inform Parliament of such authorisation.

Obligation to personal military service

Article 154

1. The Defence of Hungary shall be the duty of every Hungarian citizen.

2. Citizens' obligation to personal military service and the procedure for exemption from military service on grounds of conscience or for other reasons shall be regulated in statute.

3. The duties to be performed by citizens in emergency situations shall be regulated in statute.

Obligation to provide economic and other services

Article 155

1. Every individual living or residing in the territory of the Hungarian State and every legal person operating in that territory may be required to carry out an economic activity or to provide material service, as determined in statute in the interest of national defence.

2. In establishing and discharging the duty to provide economic and other services, regard shall be paid for proportionate sharing in public burdens, protection of property, and the possibility of recourse to compensation.

Professional corps

Article 156

1. Any Hungarian citizen may voluntarily join the professional corps of a military or a police organ, upon conditions determined by statute.

2. The status and remuneration of the professional corps of the military and policing organs shall be regulated by statute.

Chapter XV
SELF-GOVERNMENTS

Local self-governments

Article 157

1. The community of electors of villages, towns, the capital city and its districts, and the counties shall have the right to self-government. The local communities shall exercise this right through representative organs elected by them as well as directly through referendum.

2. Aliens domiciled in Hungary who are of full age under Hungarian law, shall have the right to vote on the election of local self-government representatives and in local referendums on their place of residence, but they shall not have the right to be elected.

Fundamental rights and functions of local self-governments

Article 158

1. Local self-governments shall have equal fundamental rights, but their duties may differ.

2. Within the framework set by the statutes, local self-governments to manage local public affairs, and to perform communal local public services

(a) shall issue by-laws;

(b) shall adopt their organisational and operational statutes;

(c) shall be free to form associations with other self-governments, establish associations representing their interests, co-operate with local authorities of other countries, and join international organisations of self-governments;

(d) shall exercise owner's rights in respect of self-government property;

(e) may found undertakings using their property and revenues available for that purpose, without prejudice to the performance of their mandatory tasks;

(f) shall determine the types and rates of local taxes;

(g) shall adopt annual budgets and utilise them independently;

(h) may request information from, initiate decision by, and express opinion to competent organs;

(i) may establish self-government symbols and may award local distinctions and honorary titles.

3. The fundamental rights of local-governments shall enjoy judicial protection.

Article 159

1. The mandatory functions of local self-governments shall be defined [only] by statute.

2. The central budget shall provide the funds necessary for the fulfilment of local responsibilities.

3. A statute may make it obligatory to local self-governments to discharge mandatory functions in association with others.

Organisation and functioning of local self-governments

Article 160

1. The representative bodies of villages, towns and metropolitan districts shall be headed by a burgomaster, the metropolitan [Budapest] self-government assembly by the Chief Burgomaster, and the county assemblies by their presidents (henceforth referred to jointly as burgomasters).

2. The term of office of representative organs and burgomasters shall be four years from their election. Elections of representative organs and burgomasters shall be held every four years in the same month.

3. Before the expiry of its term of office a representative organ may declare its dissolution under the conditions determined by the Statute on Local Self-Governments.

Variant A

4. On the proposal of the Government, Parliament may dissolve a representative organ functioning contrary to the Constitution.

Variant B

4. *Upon the request of the organ exercising legality control, the court shall dissolve a representative body functioning contrary to the Constitution.*

5. If the term of office of a representative body, its members or a burgomaster terminates before its expiry, the new mandate shall last until the expiry of the original term.

Article 161

1. The representative organ [of local self-governments] shall be independent and shall have general competence in the conduct of local public affairs.

2. *A local public matter may exceptionally be referred in a statute to the competence of another State organ only in cases where so required by the nature of the matter involved or by criteria of efficiency or economic expediency.*

Article 162

1. The decisions and functioning of the representative organs shall not be reviewed except their conformity with law.

2. Legality control over local self-governments shall be the responsibility of the Government, while financial and economic control shall be exercised by the State Audit Office.

3. *Decisions of local self-governments violating the law shall be subject to court review upon request of the control organ.*

Article 163

1. Local self-government, local referendum and people's initiative shall be regulated in statute.

2. The Statute on Local Self-Government shall be adopted by Parliament by a qualified majority of votes.

Self-governments of national and ethnic minorities

Article 164

1. The national and ethnic minorities living in the territory of the Republic of Hungary may form local and central self-governments.

2. The self-government of national and ethnic minorities shall be regulated by statute.

Public corporate bodies

Article 165

1. Public corporate bodies shall be self-governing organisations with registered membership established by statute.

2. Public corporate bodies shall carry out public functions in relation to their members and with regard to their professional activities.

3. Public corporate bodies shall be legal persons.

PART V
EMERGENCY SITUATIONS

Chapter XVI
SPECIAL RULES ON EMERGENCY SITUATIONS

State of preventive defence

Article 166

1. A state of preventive defence shall exist when

(a) the Republic of Hungary is threatened by an attack of a foreign power; or

(b) the territory of the Hungarian State is unexpectedly invaded by a foreign armed group.

2. The existence of a state of preventive defence shall be established by the Government, which shall declare a state of preventive defence in ordinance.

3. Parliament shall decide on the approval of the Government's ordinance within fifteen days of its promulgation.

4. In accordance with the plan of national defence approved by the President of the Republic, the Government shall immediately take

(a) preparatory measures proportionate to the threatening attack; or

(b) the measures necessary for repelling the armed group which has unexpectedly invaded the country.

5. The Government shall immediately inform Parliament and the President of the Republic of the measures taken in accordance with para. 4.

6. The Government shall end the state of preventive defence upon discontinuance of the conditions for its declaration.

State of armed defence

Article 167

1. A state of armed defence shall exist when

(a) the Republic of Hungary is directly threatened by an attack of a foreign power;

(b) the attack of a foreign power has actually taken place; or

(c) a state of war has been declared.

2. Parliament shall decide on the declaration of a state of war and on the conclusion of peace by a qualified majority.

3. Parliament shall establish the existence of a state of armed defence by a qualified majority and shall declare the state of emergency.

4. The state of emergency shall be terminated upon cessation of the acts of war by Parliament.

Article 168

1. During a state of emergency Parliament may not decide its own dissolution and may not be dissolved.

2. If Parliament was previously dissolved, in case of a state of emergency the President of the Republic shall convene a session of the previously dissolved Parliament and Parliament shall decide on the prolongation of its mandate.

3. If Parliament's term of office expires during the state of emergency, its mandate shall be prolonged until the termination of the state of emergency.

Article 169

1. If the Speaker of Parliament, the Prime Minister and the President of the Constitutional Court have jointly established that Parliament is prevented from declaring a state of emergency, the existence of the state of emergency shall be established and declared by the President of the Republic on their proposal.

2. At its first session after the termination of its inability to perform its functions, Parliament shall examine the justifiability of the existence of the state of armed defence and of the declaration of the state of emergency and shall decide by a qualified majority on the approval of the decision of the President of the Republic.

Article 170

1. During a state of emergency the emergency measures determined by separate statute shall be introduced by government ordinance.

2. In case authorised by the statute containing the rules applicable in states of emergency, the government ordinance may depart from provisions of statutes or suspend their application and adopt other specific measures [required].

3. The Government's responsibilities connected with the state of emergency may be assigned to a smaller body [Cabinet] consisting of the Prime Minister and ministers designated by the Government.

National Defence Council

Article 171

1. The National Defence Council shall consist of members of all parliamentary groups of deputies, deciding on the ground of proportionality of the number of the deputies belonging to the parliamentary groups; it will be established by Parliament for its term of office.

2. In order to prepare for the discharge of its functions during a state of emergency, the National Defence Council may at any time request information from the Government on matters of national defence.

3. During a state of emergency the National Defence Council

(a) shall be in continuous session and control the Government's actions in the state of emergency, and may annul the Government's ordinances and measures;

(b) shall decide on the employment of the Armed Forces and the Frontier Guards inside or outside the country as well as on authorising the entry of foreign military forces into the territory of the Hungarian State.

4. The President of the Republic and the members of the Government may attend, and have the right to be heard at, the meetings of the National Defence Council.

Article 172

1. The Speaker of Parliament shall convene Parliament on the proposal of the National Defence Council.

2. If during a state of emergency Parliament cannot be convened, the National Defence Council shall, save as set out in para. 3, exercise all powers of Parliament.

3. The National Defence Council

(a) may issue ordinances replacing statutes; its ordinances may not modify the Constitution and the statutes adopted by a qualified majority and may not be contrary to them;

(b) may not elect the President of the Republic.

State of necessity

Article 173

1. A state of necessity shall exist when acts of violence within the country seriously threaten

(a) the constitutional order and functioning of the Hungarian State; or

(b) the life and property of the citizens.

2. In those cases Parliament shall declare a state of necessity.

3. A state of necessity shall be governed *mutatis mutandis* by the rules established by the Constitution for the state of defence.

State of catastrophe

Article 174

1. A state of catastrophe shall exist when

(a) a natural disaster, an industrial accident, or a natural, technical or social event of a mass scale gravely endangers or imperils safety of life and property, and

(b) immediate and special administrative action by territorial or central state organs is needed to avert or terminate such events.

2. The existence of a state of catastrophe shall be established by the Government, which shall declare in ordinance a state of catastrophe for a territorial unit of public administration as an area afflicted by catastrophe.

3. During a state of catastrophe the Government may

(a) depart, in its ordinance issued to avert or terminate a catastrophe, from provisions of statutes not adopted by a qualified majority;

(b) order the employment of military and policing organs.

Functioning of the Constitutional Court in states of emergency

Article 175

1. In states of emergency the Constitutional Court shall function pursuant to this Article.

2. The Constitutional Court shall not examine the legal norms adopted in view of a state of emergency until after its termination, but may establish their unconstitutionality even with retroactive effect to the state of emergency.

3. The Constitutional Court may even in a state of emergency examine and annul statutes and ordinances adopted to meet that situation, if they

(a) violate fundamental rights;

(b) derogate from a fundamental right which shall not be subject to derogation in emergency situations;

(c) were adopted in violation of the rules established for states of emergency.

Legal regulation relating to states of emergency

Article 176

1. The rules applicable in states of emergency shall be defined in a statute to be adopted by a qualified majority which shall define

(a) the modalities of the suspension of, or derogation from, fundamental rights;

(b) the types of the emergency measures may be taken;

(c) the composition and rules procedure of the National Defence Council;

(d) the modalities of modifying the functions of State organs and the rules of procedure applied by them.

2. Any ordinance of the National Defence Council or other legal norms regulating the state of emergency shall, but for para. 3, be deemed to be repealed upon termination of the state of emergency.

3. Within fifteen days from the termination of the state of emergency Parliament may prolong for a limited period the validity of the ordinances issued by the National Defence Council and the Government applicable in the state of emergency.

PART VI
PROTECTION OF THE CONSTITUTION

Chapter XVII
CONSTITUTIONAL COURT

Function and competence of the Constitutional Court

Article 177

1. The Constitutional Court shall guard over the observance of the provisions of the Constitution.

2. The functions and competence of the Constitutional Court shall be determined by the Constitution.

3. The detailed rules on the Constitutional Court and the constitutional judges shall be laid down by statute requiring qualified majority.

Article 178

The Constitutional Court shall be competent to

(a) decide upon the motion of the President of the Republic on the constitutionality of any statute [bill] adopted by Parliament not yet promulgated;

(b) decide—upon a motion by Parliament, any of its standing committees, the President of the Republic or the Government—the conformity with the Constitution of an international treaty to be concluded;

(c) decide of the constitutionality of statutes and ordinances or their consistency with international treaties upon motion by Parliament, any of its standing committees, the President of the Republic, the Government, the President of the Supreme Court, the Chief Public Prosecutor, the President of the State Audit Office, the parliamentary commissioners, a local self-government, the central self-government of a national or ethnic minority, any public authority in respect of legal norms applicable in a case pending before it, and any person in respect of legal norms applicable to a case pending before a public authority;

(d) decide constitutional complaints lodged by any person who claims to have suffered a wrong in consequence of the violation of a constitutionally guaranteed right by the application of an unconstitutional norm of law, provided the complaint was lodged after the termination of the administrative procedure under the conditions and within the time limit set by statute;

(e) interpret provisions of the Constitution upon a motion by Parliament, any of its standing committees, the President of the Republic, the Government, the President of the Supreme Court, the Chief Public Prosecutor, the President of the State Audit Office, the parliamentary commissioners, a local self-government, and the central self-government of a national and ethnic minority;

(f) establish, upon motion by any person certifying her legal interest, the existence of an unconstitutional state of affairs resulting from a legislative omission to make a statute;

(g) decide, upon a motion by the organ concerned, conflicts of competence between Parliament, the President of the Republic and the Government, and between any of these organs and, except for courts of law, another State organ or a self-government;

(h) decide of the legal responsibility of the President of the Republic upon motion by Parliament;

(i) examine the rejection of an initiative for a referendum upon motion by the organiser of the initiative;

(j) decide—upon a motion by Parliament or its competent committee, fifty deputies, the President of the Republic or the Government—the conformity with the Constitution of an initiative for a referendum or of a referendum held.

Procedure before the Constitutional Court

Article 179

1. The Constitutional Court shall proceed upon a written application by the organ or person entitled to initiate procedure.

2. The Constitutional Court shall examine only questions raised in the application except when the unconstitutionality of a legal norm not affected by the motion necessarily follows from the unconstitutionality of the legal norm under consideration.

Variant A

3. The Constitutional Court shall forward the application to the organ which issued the legal norm or, in the case of a statute, to the proponent of the bill, the law-making body, and to the organ or person in respect of which/whom the decision of the Court may contain an obligation connected with the matter, and shall invite them to submit their views to the Court within the time limit set by statute. The omission to submit views shall not bar the Constitutional Court to deliver the decision.

Variant B

Para. 3 to be omitted.

Article 180

Variant A

1. The Constitutional Court shall decide in full court or in a chamber composed of three constitutional judges.

2. Unless otherwise provided in the Constitution or in the Statute on the Constitutional Court, the Court shall decide *in camera* by a majority of votes.

3. The full court of the Constitutional Court shall be composed of all the constitutional judges.

4. The full court shall have a quorum when at least three-fourth of the constitutional judges, including the President or, in the event of his incapacity to perform his duties, the Vice-President, are present.

5. A chamber of three members shall have a quorum when all the three members are present.

Variant B

The Constitutional Court shall proceed full court in the cases specified in statute; in any other case it shall proceed in chamber.

Article 181

Variant A

1. The Constitutional Court shall decide in full court on

(a) matters referred to in paras. (a), (b), (e) and (h) of Article 178 and, if an examination investigation of a statute was requested, matters covered by paras. (c) and (d);

(b) matters concerning the immunity or incompatibility of a constitutional judge or the termination of his office;

(c) the election of its President and Vice-President;

(d) any matter proposed for consideration in full court by the President of the Court or three constitutional judges.

2. In cases covered by para. 3 (c), the rules relative to the quorum and the majority of votes required for the adoption of decisions shall be laid down in the Statute on the Constitutional Court.

3. The Constitutional Court shall decide in a chamber on any matter not reserved for consideration in full court.

Variant B

Article 181 to be omitted.

Decisions of the Constitutional Court

Article 182

1. The Constitutional Court shall declare void, wholly or in part, any statute or other legal norm (henceforth referred to in this Chapter as legal norm) contrary to the Constitution, *and prohibit the application of any unconstitutional rule adopted by an international organisation or institution, such prohibition having the same legal consequences as the annulment.*

Variant A

2. A legal norm annulled shall lose effect on the day on which the decision on annulment is published and shall not be applicable from that day.

3. Where so warranted by interests of legal security, the Constitutional Court may also exceptionally annul a legal norm with effect *ex tunc* or *ex nunc*.

4. Except for paras. 5 and 6, annulment shall not affect the legal relationships established prior to the publication of the relevant decision, nor the rights and obligations emanating there from.

5. The Constitutional Court shall order the reopening of the criminal procedure concluded by a final judgement on the basis of an unconstitutional legal norm, if the person convicted under it has not yet been relieved from the legal prejudices resulting from the judgement, provided that the nullity of the legal norm applied in the procedure would have lead either to the mitigation of the punishment or the [punitive] measure, or would have resulted in acquittal, or would have diminished the degree of his responsibility. In other cases the Constitutional Court shall not review court decisions.

6. If the Constitutional Court has allowed a constitutional complaint, the complainant may request a rehearing of her case under separate statute.

Variant B

Paras. 2 to 6 to be omitted.

Article 183

Variant A

1. On the subject-matter of the application, the Constitutional Court may by [a separate] decision adopt an interim measure suspending the application of the legal norm under consideration for the period of the examination. The legal norm suspended by the interim measure shall not be applied from the day of publication of the order containing the interim measure.

2. The conditions for adoption of interim measures shall be determined by the Statute on the Constitutional Court.

Variant B

Article 183 to be omitted.

Article 184

1. The Constitutional Court shall deliver its decisions in the name of the Republic of Hungary; it shall state the reasons for the decision.

2. The decisions of the Constitutional Court shall be binding on everybody.

3. Against the decisions of the Constitutional Court there shall be no appeal.

Organisation of the Constitutional Court

Article 185

1. The Constitutional Court shall consist of eleven members.

2. The Constitutional Court shall elect, from among its members, a President and a Vice-President for a term specified by statute, who may be reelected. Reelection for these offices shall not affect the tenure of office of constitutional judges.

Constitutional judges

Article 186

Variant A

1. Any Hungarian citizen having the right to vote who has completed forty-five years, satisfies appropriate professional standards, has a clean criminal record and has a law degree may be elected constitutional judge.

2. A person who, for four years preceding the election has been a deputy, a member of the Government, official of a political party, or has held a higher office in public administration shall not be eligible to the Constitutional Court.

3. The election of constitutional judges shall be proposed by a selection committee consisting of a representative of each parliamentary group of deputies.

4. Parliament shall elect the constitutional judges for a tenure of twelve years. Election shall require two-thirds of the votes cast in favour of all the deputies.

5. Constitutional judges may not be reelected.

Variant B

Paras. 1 to 5 to be omitted.

Article 187

1. Constitutional judges shall be independent and take their decisions solely on the basis of the Constitution and the statutes in conformity with the Constitution.

2. A constitutional judge shall not be removed from her post without her consent during the tenure of her office, save in the cases set out in the Constitution.

3. Constitutional judges and former constitutional judges shall enjoy the same immunities as the [ordinary] judges, except that any measure against them shall be subject to the prior consent of the Constitutional Court to be given in full court.

4. The office of the constitutional judge shall be incompatible with any other State, political and economic office or occupation.

5. Constitutional judges shall not engage in activities other than scholarly, educational, artistic, and literary activities protected by copyright law.

Article 188

Variant A

1. The tenure of office of a constitutional judge shall cease upon

(a) expiry of the tenure of office;

(b) completion of seventy years of age;

(c) resignation;

(d) release from duty;

(e) establishment of incompatibility of the judge;

(f) dismissal of office;

(g) loss of a clean criminal record;

(h) loss of the right to vote.

2. The detailed rules on the termination of the office of constitutional judges shall be laid down by statute.

Variant B

The cases in which the tenure of office of constitutional judges terminate shall be specified by statute.

Chapter XVIII

PARLIAMENTARY COMMISSIONERS FOR CITIZENS' RIGHTS

Functions of the parliamentary commissioners for citizens' rights

Article 189

1. For the protection of fundamental rights, Parliament shall elect a parliamentary commissioner for citizens' rights and her general deputy, a parliamentary commissioner for rights of national and ethnic minorities, and a commissioner for data protection (henceforth referred to jointly as parliamentary commissioners), who shall be responsible solely to Parliament.

2. The parliamentary commissioner for citizens' rights shall examine violations of fundamental rights, save the cases belonging to the competence of the parliamentary commissioners for minority rights and data protection.

3. The parliamentary commissioner for rights of national and ethnic minorities shall examine any violations of these rights.

4. The commissioner for data protection shall examine any violations in the protection of personal data and in the right of citizens to access to data of public interest.

Election of the parliamentary commissioners

Article 190

1. The parliamentary commissioners shall be elected upon the proposal of the President of the Republic by Parliament for a term of six years.

2. The election of parliamentary commissioners shall require two-thirds of the votes in favour cast of all the deputies.

Actions taken by parliamentary commissioners

Article 191

1. In the cases specified by statute, action by a parliamentary commissioner may be initiated by anyone capable to establish his right or lawful interest in the elimination of a violation of fundamental rights. Parliamentary commissioners may also take action *ex officio.*

2. The parliamentary commissioner shall examine or have examined a violation in connection with fundamental rights within her competence and may initiate general or individual measures, or request (propose) action by organs of administration to remedy them.

3. *The parliamentary commissioner shall not take action in respect of courts and shall not take action in cases pending in courts.*

4. The parliamentary commissioners shall submit an annual report on their experiences to Parliament; the reports shall be published *subject to the rules on the protection of official secrets and personal data.*

5. The detailed rules relating to the functions and status of, as well as the actions taken by, the parliamentary commissioners shall be laid down in statute.

Chapter XIX
MODIFICATION OF THE CONSTITUTION

Article 192

1. The statute modifying the Constitution and the statute on a new Constitution (henceforth referred to jointly as statute modifying the Constitution) shall be adopted by the votes cast in favour of two-thirds of all the deputies.

2. The President of the Republic shall not exercise his prerogatives stated in Articles 74 and 75 with respect to a statute modifying the Constitution.

Article 193

Variant A

1. The statute modifying the Constitution shall not be promulgated within sixty days of its adoption. During that period at least fifty deputies or 300 000 electors may initiate a referendum against the statute. In that case referendum shall be mandatorily held.

2. The statute modifying the Constitution shall be deemed to have been adopted and shall be promulgated if

(a) no referendum was initiated against it within sixty days of its adoption [by Parliament]; or

(b) the referendum [against it] was invalid or without success.

Variant B

1. Parliament shall dissolve itself upon adoption of a statute modifying the Constitution.

2. The new Parliament shall decide on ratifying the statute within sixty days of its assembly. Ratification shall require the votes cast in favour of two-thirds of all the deputies.

3. The statute shall deemed to have been adopted and shall be promulgated if Parliament has ratified it with unchanged content.

PART VII
CONCLUDING PROVISIONS

Chapter XX
ENTRY INTO FORCE AND EXECUTION OF THE CONSTITUTION

Referendum on the Constitution

Article 194

1. The Constitution shall be promulgated and enter into force after it has been confirmed by a referendum.

2. The procedure for submitting the Constitution to a referendum and the date of the referendum shall be determined by Parliament.

Entry into force

Article 195

The Constitution shall enter into force on the first day of the seventh month following its promulgation.

Transitory provisions

Article 196

1. The provisions of the Constitution shall be applied to matters pending at the moment of its entry into force.

2. The legal norms adopted before the entry into force of the Constitution and other general legal instruments issued by the organs of the State shall remain in force [unless and] until they have been expressly repealed.

3. Acts-in-law performed under legal norms in force before the entry into force of the Constitution shall continue to be effective, and their legal consequences shall remain untouched.

4. The term of office of officials elected or appointed under legal norms adopted before the entry into force of the Constitution shall continue until the offices have been filled in accordance with the Constitution or have been explicitly abolished.

5. The tenure of the constitutional judges exercising their office at the date of the entry into force of the Constitution shall be prolonged for twelve years.

Execution of the Constitution

Article 197

1. The execution of the Constitution shall be the responsibility of the Government.

2. The Government shall submit to Parliament the bills necessary for the regulation of subject-matters specified by the Constitution.

3. The Government shall ensure that the legal norms adopted before the entry into force of the Constitution and other legal instruments issued by the organs of the State before that date be made consistent with the Constitution.

Legal norms losing effect

Article 198

The statutes, ordinances and other legal norms enumerated in the Annex to the present Constitution shall lose effect concurrently with the entry into force of the Constitution.

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BOOK REVIEW

In Memoriam Zoltán Magyary: In Three Parts

Zoltán Magyary (1888–1945), who has now achieved almost legendary fame, stands out from amongst the distinguished representatives of Hungarian scholarship on public administration in the inter-war period. As a result of his scholarly work in creating a new School, and his educational accomplishments, he deserves to be ranked amongst the greats.

His contemporary, Barna Horváth, writes in his memoirs that, according to his experience, *"Mr. Magyary judges people and parties equally badly"* [Barna Horváth, *Forradalom és alkotmány. Önéletrajz 1944–45-ből (Revolution and Constitution. Autobiography 1944–45)*, Budapest, 1993, p. 69]. To his detriment, he was not able to keep himself away from the temptations of politics, and although he did not undertake an active public role his name still became linked with certain extreme views and movements. In this way, Magyary involuntarily contributed to his own and his wife's tragedy.

The national literature in recent years has marked out Zoltán Magyary's place in the pantheon of scholarship on public administration studies. This is reinforced by the three publications discussed below.

I. The Master and his Disciples

[SZANISZLÓ, József: **A Magyary-iskola és háború utáni sorsa. Közigazgatástudomány–történeti visszapillantás** (The Magyary School and its Destiny after the War: A study in the History of Hungarian Public Administration), ELTE Államigazgatási Jogi Tanszék, Budapest, 1993. p. 211].

The literature on Magyary has been enriched by a significant monograph. It is, at the same time, not to be doubted that a Magyary legend exists. Perhaps the most splendid proof of this is the feature film by Bereményi, *A Tanítványok (The Disciples)*, produced and shown already in the mid-1980's, which evoked a great response. Although the intention of the film—"to break through the wall of silence"—is scarcely to be doubted, it is still an unusual phenomenon in the film-world that an expert in public

administration studies should be placed in the limelight. Zoltán Magyary, however, proved to be a good medium for the film's creators, and through his personality the aspirations of a time past were revived on the screen for one-and-a-half hours. Nothing better proves the success and effect of the film than that the attention of the public—and especially with regard to the then approaching centenary of Magyary's birth—subsequently became intense. Naturally, we cannot forget the political "thaw" which made all this possible. In professional circles, one was, however, able earlier to read and hear Magyary's name more often.

József Szaniszló has come to his subject with a fortuitous approach (incidentally, this is not the first time he has dealt with the Magyary School), inasmuch as his style is readable, and thus he can expect to excite the interest of expert and lay public alike. His aim is deserving of respect: primarily, he wishes, with the tools of scholarship, to introduce the diverse professional and scholarly activity of the professor who created a School, and the internationally-renowned and respected expert in administrative studies. At the same time, he attempts to peel away from Magyary's opus, as well as from the critiques of this, the layers of distortion. We believe that he has achieved his purpose. Some uncertainties can only be caused by difficulty in defining the genre, because József Szaniszló experiments with the creation of something novel—the forging into one work of a scholarly monograph and of a memoir—although it may well be that the internal proportions, obviously according to the author's original intention, enforce the monographic character of the work. It is also not accidental that a personal tone has appeared in József Szaniszló's work, for as a significant member of the former intellectual workshop, and as one of the disciples, he obviously has difficulties in making his observations in every case from an appropriate distance. His work has become only more realistic and instructive as a result of his occasionally subjective and almost passionate tone. With the inclusion of his own experience, however, he surely enriches our knowledge.

It is worth while, firstly, to philosophise on how József Szaniszló reports on the succession to the job which became vacant following the retirement in 1960 of Professor Károly Mártonffy—Head of the Department of Public Administrative Law at ELTE Faculty of Political and Legal Studies—in his significant work of 1977 on the history of the Department, which he himself cites several times, and how he interprets the same event in his current volume. [See: *A közigazgatástudomány oktatásának és tanszékeinek története az ELTE Jog- és Államtudományi Karán 1777–1977 között (The History of the Teaching and Departments of Administrative Studies at ELTE Faculty of Law and Political Studies between 1777 and 1977)*, hereafter, *Public Administrative Studies*, Vol. 3, Budapest, 1977, pp. 623–624; or *A Magyary-iskola és háború utáni sorsa (The Magyary School and its Post-War Fate)*, pp. 123–124]. On the basis of a comparison of a section (which is more in reference to the Magyary School) from the two books the conspicuous change in approach is perhaps more apparent. As a preliminary, one should mention the background. The writings on and reviews of fascist and national-socialist state systems which appeared in *Közigazgatástudomány (Public Administrative Studies)*, a periodical published by the Magyary Institute between 1930 and 1944, although small in number, have justifiably

caught the critics', and thus also József Szaniszló's, attention. One of the periodical's employees, Kálmán Karay, wrote complimentary words in the 1943 edition about a volume discussing the German administration introduced in Nazi-occupied Poland. We can read the following, amongst other things, in Karay's review: "*The most interesting present public administrative and organistorial attempt is the High Protectorate, as appears also from the Preface to the book in question written by High Governor Frank (...) the National Socialist state ethos for the first time prevails, with the help of a newly organised and unified public administration, over a territory on which foreign people live* (*Public Administrative Studies*, 1943, Nos. 4–5, p. 154). He then continues: "*The purposeful and planned order of the High Protectorate introduced in the autumn of 1939 supplied an experience which provides a useable basis for the eastern intervention of the German people*" (Ibid, p. 154). And finally, a third quotation: "*The extremely interesting study of the Secretary of State of the High Protectorate expounds on why it was necessary in Poland to introduce an order in the German sense. The Protectorate of a nation—he says—which was blinded by hatred and incapable of utilising the land and of organising and governing, had in its entirety to be put into German hands, and it was only possible to entrust Poles with completely mechanical execution or tasks which had wholly local significance. The country had to be covered with the iron web of German order and the Protectorate in order to insure and make useable the land for the Germans. This order is ensured by the unity of the public administration, by which every branch of public administration is held in one hand, according to the principle of command*" (Ibid, p. 155). In his monograph on Departmental history, also referred to above—that is, in 1977—József Szaniszló evaluates Kálmán Karay's article as follows: "*...such a systematic study of the fascist administrative systems is thought-provoking and, intentionally or unintentionally, it gives the impression that the author has a special affinity to fascism, and the related German National Socialism. It has to be said, however, that this is not only an impression, because Karay refers to the German administration of occupied Poland—in the course of one of his book-reviews—in tones of the highest admiration. This statement is in itself enough to document that its author's immersion in purely fascist material, even if it had been undertaken with objectivity, was not accidental, but is a severely censurable declaration of a political stance, because it also brings into question the work of the editor in publishing the review*" (József Szaniszló, *Public Administrative Studies*, Vol. II, pp. 418–419). In his recent monograph, he could not likewise circumvent reference to Kálmán Karay: "*In his book-review, Kálmán Karay writes with admiring words of the account by Freiherr Du Prel of the excellence and efficiency of the German administrative organisation introduced in Poland when occupied by Hitler, which the Marxist critique equated to an agreement with the actions under Hitler. However, an organisation as such—similar to nuclear energy—is not an ideological creation. In themselves, both can be excellent realities, and their utilisation for wrong purposes does not deprive them of their qualitative character*" (*The Magyary School and its Post-War Fate*, pp. 85–86).

We believe that the sections cited speak for themselves. It is difficult to understand

what effected the change—casting a shadow over his recent monograph—in József Szaniszló's factual and objective verdict of 1977? Kálmán Karay's writings, that is, actually fulfil the criteria of an opinion which deserves to be stigmatised. Unfortunately, József Szaniszló is mistaken when he suggests that only the Marxist critique could find something objectionable in Karay's writing—that is, that it is not only this world-view which was and is opposed to the ideology and practice of fascism and National Socialism. At the same time, we also cannot share his opinion that this organisation can be evaluated in itself. József Szaniszló's theorem might be true in general, but in this case he is most probably mistaken. A laboratory creation must also be judged by the standards of practice, which is not even to mention the public administration system already tailored to the body of the then Polish High Protectorate. The public administration introduced there by the Nazis was intended to ensure totalitarian rule over the occupied territories and subjugated people. This "*incidentally*" cost the lives of six million Jewish citizens. The system and mechanism of the public administration was designed in order to attain these ignoble aims; therefore, we are not faced with a dysfunction in a complete and perfect system. For a humane and democratic society, a civil administration where officials carry arms cannot be acceptable *per se*. Therefore, we find it by all means unnecessary and erroneous that József Szaniszló has reviewed his previous true evaluation.

The first part of the volume praises Zoltán Magyary's work as a public servant and scholarly organiser; it simultaneously provides an overview of the one-and-a-half decade long activity of the Magyary School. It was as a result of a trick of fate, József Szaniszló presumes, that the School did not receive appreciation in its own time, but rather from a power system which did everything following the War in order to cause the workshop, which remained leaderless, to disintegrate. The unchanging nature of the values represented by the Magyary School's aspirations prove, he later writes, that "*In the reform measures on public administration published in the Hungarian Gazette after the Second World War, and later in its structuring of different information, which refers to issues throughout public administration (...) the elements of the Magyary School's educational system can be shown in every aspect, although, it is true, in rather a distorted form, or with a different interpretation from the original*" (*The Magyary School and its Post-War Fate*, p. 11). In the autumn of 1944 Magyary himself wrote distraughtly the following lines "*My only proposal which was realised was the regulation and bringing into force of the practical public administration exam*" (Ibid, p. 76). The possibility of realisation was, however, granted. Prime Minister István Bethlen appointed Zoltán Magyary as the Government Commissioner for the Preparation of the Rationalisation of Public Administration from 1931. Magyary was convinced that "*we have to form our state organisational structure, which was bequeathed to us by the 19th century and is, therefore, outdated, into a structure which is able to satisfy the economic and social demands of the 20th century; in turn, one of the prerequisites of this would be that*"—in his words—"*the Prime Minister's responsibility for the efficiency and good working of the organisation and functioning of public administration should be clearly stated. In this way, public administration would receive*

a chief executive" (Ibid, p. 29). One of Magyary's fundamental views—which is shared today by very few—concerns the predominance of the executive power: "*The 19th century pre-industrial state, based on the balance of different branches of power—legislature, judiciary, executive—in which public administration is under the supervision of parliament, has been, or should be, replaced by the 20th century post-industrial state, built upon the actual predominance of public administration*" (Ibid, p. 58). His view was realised in those states in which the balance between the branches of power was upset and government was seized by left- or right-wing totalitarian forces.

The Hungarian Institute of Public Administration, established in 1930, was the workshop which was viewed and treated by Magyary, József Szaniszló remarks, "*as the future residence of the Government Commissioner for Rationalisation, the intellectual centre of his activity*" (Ibid, p. 53). Professor Magyary and his disciples aspired to the assertion of complexity in their stance on public administration. Public administration is for the people, they proclaimed, and therefore public administration is not exclusively the tool and stage of exercising power and enforcing law; it has to be a structure equally satisfying people's economic, social, and cultural needs. As Magyary believed, "*The quality of public administration depends on the officials*" (Ibid, p. 73).

Magyary and his circle suggested that the rationalising reforms must be implemented from above to below; that is, the transformation of public administration must be initiated at a governmental level, and starting from there it has to reach to the lowest levels. "*Magyary's ideal*"—as we can read in Barna Horváth's memoirs cited above—*is efficient intervention. It was self-evident to him that efficiency meant that the intervention was, at the same time, correct. Magyary displayed a strange blindness towards the ultimate ends, simultaneously having an eagle's eye for the recognition of the most immediate aims and tools (...) There was something revolutionary in his merciless rationalisation*" (Barna Horváth, *Revolution and Constitution*, p. 68).

Magyary's suggestions were not put into practice. The government Commission on Rationalisation was shortly thereafter placed under the supervision of the Minister of the Interior. Seeing the failure of his activities as Government Commissioner, Magyary resigned his position in 1933. This failure, however, did not mean defeat. Retreating to his Department and Institute, he continued with the scholarly planning of his ideas, aiming at the re-shaping of the whole Hungarian public administration. During the 1930s, he undertook empirical research in the Tata district; subsequently, the creation of the Tata model district led to the partial realisation of scholarly ideas.

The acceleration in the events of war, the tragic death of Zoltán Magyary in 1945, and the circumstances of the change in social system after the War together resulted in the disintegration of the School.

The memoirs, recorded on audiotape in the 1970s, of István Bibó, who was also at home in the field of administrative studies, are thought-provoking: Zoltán Magyary "*was a person of purely technocratic views, who was indifferent to democracy and the underlying ideas of liberty and human dignity; he was only interested in large-scale organisation (...) Despite all this, he was a significant critical mind, who put the whole anarchy, impotence, and arbitrariness of the*

public administration of Horthy's Hungary in the stocks" [Tibor Huszár: *Bibó István. Beszélgetések, politikai, életrajzi dokumentumok (István Bibó. Discussions, political, biographical documents)*, Budapest, 1989, p. 107].

It was a paradoxical phenomenon of the decades following 1942, József Szaniszló presumes, that whilst Zoltán Magyary's name was unmentionable for a long time some of his suggestions were realised—albeit without his name being used.

The second part of József Szaniszló's volume briefly illuminates the lengthy age of silence and re-discovery. Starting at the beginning of the 1970s, the scholarly literature began to take note of the work of the Magyary School. We would like to refer, without attempting to be comprehensive, to the works of Aurél Hencz, Andor Csizmadia, Lajos Lőrincz, and Lajos Szamel. In the second half of the 1980s, the partial re-publication of the works of Zoltán Magyary and his circle, as well as the centenary of his birth in 1988, provided a good opportunity for re-acquaintance with the rich oeuvre. A new Magyary picture is starting to take shape. In this József Szaniszló, the author of the monograph, plays an undisputed and imperishable role. The disciple paid his tribute to the master.

II. "The most influential personality of Hungarian public administration studies."

[**Közigazgatástudományi antológia**, Második kötet (Antology of Hungarian Science of Public Administration, Vol. II.), ed.: LŐRINCZ, Lajos, Unió, Budapest, 1994. p. 163].

During the last decade a number of anthologies on public administrative studies have been published, evoking the memory of the eminent—but often forgotten—authors of the start of the century and the subsequent decades. The representatives of the Magyary School—led by Zoltán Magyary, the professor who founded the School—were accorded a prominent place in these selections. These breviaries, we believe, were crowned by the publication a few years ago of the facsimile edition of Magyary's main work, "*Hungarian Public Administration*", first published in 1942. Now, however, a further selection should be discussed.

The second volume of the anthology on public administration studies, described as "study material", encompasses two themes. Firstly, we can read a study by Lajos Szamel on German public administrative scholarship. The analysis of Professor Szamel is followed by a few writings representing (modern) German public administration studies from Max Weber to Renate Mayntz.

The second, shorter section (pp. 121–163) traces the development of Hungarian scholarship on civic public administration. The introductory study, by Lajos Szamel, outlines the historical route which civic public administration studies has followed from its inception—that is, from the start of the 19th century—to its culmination, the disintegration of the Magyary School.

According to Lajos Szamel, scholarship on public administration has developed tardily in Hungary for several political and social reasons, and its first representatives—such as Győző Concha—mostly, in undertaking it, narrowed it down to public administration law. "*Civic Hungarian public administration scholarship*"—as Professor Szamel's summary states—"*as a result of its German orientation has its root in legal studies on public administration*" (p. 124). A further contribution to the "permanent"

tardiness lies in the fact that by the time public administration and legal positivism conquered Hungary in the first two decades of the 20th century, in western Europe this had already been surpassed by public administration scholarship. It remained, however, the predominant theoretical trend until the 1920s, with eminent representatives such as Károly Kmetty and Ede Márffy.

However, in addition to the legal positivism of public administration exercised as a theoretical study, the effect of public administration legal dogmatics can, as a result of the work of Viktor Jászi, Elek Boér, Móricz Tomcsányi, István Ereky, and others, also be demonstrated. The success of this conviction was, we can read, based on the fact that its adherents succeeded in proving with the tools of science that "*it is not only criminal law and private law which have their own terminological system, but also public administration law*" (p. 128).

As a result of their professional standard and international recognition, the activity of Zoltán Magyary and his School was the climax of Hungarian civic public administration scholarship. Professor Szamel provides a to-the-point review of the scholarly activities of Magyary and his followers. Magyary, as is well-known, was no "*armchair scholar*", and was not even a representative of theoretical studies. He attempted to realise in practice his theoretical and scholarly ideals. He came close to the fulfilment of this possibility at the start of the 1930's, as the Government Commissioner responsible for Rationalisation. His reform endeavours and suggestions for rationalisation remained, however, for the most part on paper, because the government in power "*needed a decisively suppressive public administration by the authorities*" (p. 130). As a result of these narrow-minded politics, not even the widely-accepted view that it is necessary to increase within the limits of the rule of law the effectiveness and economy of public administration, which had a comprehensive effect in public administration at that time, could prevail. Zoltán Magyary was led to this realisation through his study trips abroad—from the United States of America to the Soviet Union. Effectiveness and lawfulness: these two fundamental guiding principles must pervade modern public administration. Magyary's main work was the monograph entitled "Hungarian Public Administration"—published in 1942—which he intended to be "*a new synthesis of public administration studies comprising of both public administration law and public administration doctrine*".

Subsequently, we can read about the activities of the Magyary School. From amongst the general characteristics of the School, we would like to emphasise now the thematic richness, the utilisation of empirical methodology, the mode of examination based on an international outlook, and the results-orientation. The field of study in which the authors belonging to the School worked is wide because their activities encompassed public administration law studies, public administration sociology, organisation studies, and even comparative public administration studies. The review closes with the survey of their activities in specific areas in the field, and with the mentioning of distinguished authors working in these areas, such as József Valló, István Kiss, and Károly Mártonffy.

Hungarian civic public administration scholarship is illustrated by three writings of Zoltán Magyary. Firstly, we can read through a study originally published in the 1942 volume of "*Közigazgatástudomány*" ("*Public Administrative Studies*"), entitled,

"*A mai közigazgatás lényege és feladatköre*" ("*The Essence and Tasks of Today's Public Administration*"). Magyary's central thesis is the gauging of public administration tasks, with which a modern "*post-industrial*" state has necessarily to calculate. We can read several statements which are still today thought-provoking and deserving of attention, on the executive power, on the relationship between public administration and citizens, and on public service. We find here the work entitled "*A jövő közigazgatás fejlődési iránya*" ("*Developmental Direction of Future Public Administration*"), which is the final chapter of Magyary's great monograph "*Magyar Közigazgatás*" ("*Hungarian Public Administration*"). "*Our public administration needs reforms*"—this is Magyary's summary. "*The gist of this has been expressed as the need for a pre-industrial public administration to transform into a post-industrial public administration*" (p. 150). The anthology is brought to a close by a discussion entitled "Memoirs of the Crisis of Our Theory of State". After looking at each factor which has, according to him, principally affected and described state-existence during the 20th century—such as, for example, the emergence of industrial conglomerates, the spread of the official public service, or the increase in the role of the executive powers—Magyary puts forward a critique of the Hungarian circumstances of his time. Hungary, like other states, has played its part "*in the development of technology and in the shaping of large-scale capitalism*" (p. 160). The Hungarian state is still unable to master the new requirements, because "*Hungarian governments attempt to solve the problems of the 20th century with the tools of the 19th*" (Ibid.). The tasks which entail a partial modification of the constitution can be divided into two main groups: the reform affects, firstly, the citizens' relationship with the state. As Magyary says, "*People must be given the consciousness and solid trust that the state is, on the one hand, strong; on the other hand, that the state belongs to them*" (p. 161). The transformation must, secondly, promote the "*internal perfection*" of the state apparatus. The gist of this—also one of the old fundamental theses of Magyary—can be grasped as being that the Prime Minister himself should stand at the head of the apparatus of public administration. "*The orchestra of the Hungarian state is led simultaneously by ten conductors. However, it is only the Prime Minister who is entitled to hold the conductor's baton*" (p. 162). He finishes his expositions with a short overview of the functions of the "*High Command of public administration*" as an institution supporting the Prime Minister in public administration.

Anthologies with similar themes not only help in teaching, but also provide useful aid to the "non-professional" reader who wishes to become acquainted with the deeper connections within the recent past (and, in a transpositional sense, the present).

III. "...we have reached the nadir...of our soul's affliction..."

[**In memoriam Magyary Zoltán** (ed.: NAGY, Ferenc), MTA Könyvtára, Budapest, 1995. p. 80].

Zoltán Magyary consigned these fateful words to paper on the 24th of March 1945, not long after the Soviet armies had repelled the Nazi forces from Tata and the surrounding area. Professor Zoltán Magyary and his wife, part-time University professor Margit Techert, because of the humiliations they were living through voluntarily ended their

lives on the same day. Ferenc Nagy compiled this small selection for the fiftieth anniversary of their tragic deaths, in which a few documents, previously unknown, which are in the possession of the Hungarian Academy of Sciences Library and Archive, were also given space. The moving farewell letter cited above also belongs amongst these documents. The lines of this letter flesh out the last act in the lives of two human beings who were bereft of hope. In the words of Magyary, "*...my wife and I have prepared ourselves for the great task of ensuring that our unfortunate country, by recognising the new world, should be able properly to fit in with it*" (p. 77). Unfortunately, this did not come to pass.

Amongst the materials in the selection which have value as sources, the letter written to Kunó Klebersberg in 1929, in which he gives an account to the Minister of Culture of his experiences in England, is especially noteworthy. At that time Magyary, as a chief official of the Ministry for Religion and Education, began a tour of England in order to study the institutional framework there of higher education and research. What he saw convinced him that reform—even according to an English model—of university education, scientific and scholarly research, and the stipend system in Hungary was indispensable. The excerpts from books published in the facsimile, such as a few chapters from the great volume entitled "The Fundamentals of Hungarian Scientific and Scholarly Policy"—which was, incidentally, edited by Magyary in 1927—recall Zoltán Magyary the educational politician. Our interest may also be stimulated by the note written in 1936 concerning questions of "The International Character of Scholarship. International Competition and Co-operation". Magyary saw clearly that a scholarly life enclosed within national borders leads to isolation. The ability to compete internationally can be achieved only through reforms which firstly touch upon the institutional sphere and that of financing. "*We cannot determine the direction and pace of international scholarly co-operation, neither do we dictate what should be the weapons of competition of international science and scholarship*"—as we can read in his clear reasoning—"*In cases of performances of international quality, the possibility of success and international prestige is, however, also open to Hungarian scholars and Hungarian scholarship*" (p. 71).

One can also read a few less interesting documents in this volume, such as Magyary's letter of apology from 1927, according to which it was because of the inexperience and clumsiness of a ministerial assistant that he kept waiting Lajos Ilosvay, retired secretary of state, who had wished to visit him in his office. A place has rightly been given in the anthology to the facsimile of the external and internal title-pages of a volume of a collection of studies published in 1940 in honour of Zoltán Magyary by his disciples. However, the re-publication of the table of contents would not have been less interesting.

I saw with pleasure in the collection of portraits the photograph of the founding professor of the University of Berlin's Hungarian Institute, Professor Róbert Gragger. Their relationship occurred at the time when Magyary was attached to the Ministry. This is also evidenced by their correspondence, which—thanks to Márta Schneider—has been partially researched. There may, however, still be a few manuscripts and letters by Magyary which would merit publication, but are, at the present

time, uncollated. Perhaps in the next anthology.

***

Zoltán Magyary's scholarly oeuvre, thanks to the works of recent years, has more fully taken shape. The 18th century German playwright and thinker, Gotthold Ephraim Lessing, writes thus in his enduring piece *Nathan the Wise*: "The rare being is difficult to forget". It is hardly to be doubted that Zoltán Magyary, with his scholarly virtues and human errors, was one of these "rare beings".

Gábor SCHWEITZER

A Short Monograph on the Autonomy of Ost-Tirol

Gyula GÁL: **A dél-tiroli krédés (kisebbségi adattár IV)** [The Question of Ost-Tirol (Reference Book on Minorities IV)], Budapest, Teleki László Alapítvány Könyvtára, 1995. pp. 1–45, with documents and statistical data, pp. 47–106.

The autonomies established in the western part of Europe and ensuring the coexistence of majority and minority populations in a satisfactory manner within well-settled frameworks are of particular relevance and serve as examples for the Hungarian national communities living beyond the borders. This is why Gyula Gál, an architect of the science of space law, devotes a monograph to the problems of autonomy in Ost-Tirol, dedicating it to the memory of Ernő Flachbarth, his one-time professor, a prominent authority on minority law and a custodian of the rights of Hungarian minorities in the neighbouring countries.

Gyula Gál concludes his work by stating that the "success formula" of Ost-Tirol's autonomy rests on three major factors, notably *the will to preserve self-identity, political unity, and active support by the mother country* [pp. 42 (emphasis the original's)]. The monograph provides several other important lessons in addition to these really crucial ones. The first such lesson obviously relates to territory, the significance of the territoriality of autonomy. While personal autonomy may also be an appropriate means of meeting the needs of dispersed communities, a large community living in one block and constituting a local majority is in need of territorial autonomy, which alone is capable of guaranteeing actual exercise of local public administration and satisfying human needs like attaining the desire for home and the preserving the community's self-identity. Another lesson concerns the requirement of taking the time-factor into account, since a satisfactory settlement can only result from a process often leading through pitfalls. As for the substance of autonomy, the ground work for a solution conducive to stability is laid by local power exercised in possession of adequate material resources and involving real authority as well as by enjoyment of extensive linguistic, cultural and educational rights.

Present-day Italy is comprised of 20 autonomous regions, of which 5 are accorded special status and 2 our of the 5—Trentino-Alto Adige (Ost-Tirol) and Friuli-Venezia Giulia (environs of Triest)—are governed by settlement based, at least part, on international treaty. Consequently the autonomy of Ost-Tirol, though it is of the fullest scope within

Italy, cannot be regarded as an exclusive or unique example even in the country. So Europe is not opposed to autonomy, but what needs to be done is „only" to act on the lessons formulated in or offered by Gyula Gál's book, namely the related political will should be matured in the first place. Maturity may result from several steps, with a no negligible role reserved for acquaintance with the achievements recorded under the positive arrangements, a goal which Gyula Gál's workhas performed a valuable service in pursuing. The short monograph is complete with important documents such as the text of the 1971 Statute on Autonomy.

Gábor KARDOS

Eckhard KNESSEL–Michael WOLLENSCHLAGER: **Leitfaden zum Sozialversicherungsrecht** (A Guide to the Social Insurance Law), Luchterhand Verlag Gmbh, Neuwied Kriftel, Berlin, 1996, p. 480.

The purpose of the volume is to provide some guidance for university students and the experts interest in insurance law on this complex and oft-changing domain of legal science. The authors deal with general social insurance law and the related rules of procedure. The volume gives a detailed analysis of the regulations of health, accident and pension insurance, while discussing the material resources of insurance and the provisions relative to physicians of the so-called *Krankenkasse*.

The authors take account of the 1992 pension reform, the structural rules on health services, and the legislation on social benefits which entered into force on 1 January 1, 1995. On the first pages of the volume they describe the scope of social legislation and social rights as well as the determinant factors of solving the related tasks. Also found on the opening pates are an unusually extensive index and information of the abbreviations used, serving to introduce the reader right from the start to the detailed and ample legal material and the studies of the problems involved.

The first topic discussed concerns social legislation, the substantive law and the comments thereon. The characteristics of social and private insurance are arranged and contrasted in a very expressive way. After the presentation of the legislative provisions in force and of the fundamental rules of social insurance, concern is taken with the organisational forms operated in the different areas of social insurance.

The topic of the next chapter on the organic structure of social insurance administration, followed by a coverage of the health services as provided for by law, is also highly interesting and graphically discussed. The related question include the range of policy holders, of persons subject to the compulsory scheme of insurance, the obligations of employers, and the insurance of pensioners. The rights and obligations covered by the social insurance law and the policy holders' right of option are addressed in detail. The achievements and services of health insurance are shown in tables. For that matter, the CDU–FDP coalition is contemplating measures to narrow the range of services provided under the health insurance scheme, a plan increasingly opposed by the trade unions in Germany.

Again, the chapter dealing with the legally guaranteed health services and their financial aspects is highly instructive as it underlines the key role which the State in a social market economy plays in raising the necessary finance.

The next section of the volume describes the accident-related benefits due under the law. It points out that the efficient protection against industrial accidents, considerably reducing their frequency and the related costs, outlines the range of policy holders and the relationship between legislative provisions in the sphere of health and accident insurance, and presents real-life cases in which clients are or are not entitled to compensation from accident insurance companies.

Last but not least, the volume discusses the pension insurance regulation. The right to pension insurance had been elaborated at the end of 1980s and the relevant law became operative as of 1 January 1992. The law establishment the entitlements of persons who have worked in different occupational categories. The volume refers to the freedom of insurance guaranteed by law and provides a list of pension insurance services and the activities under rehabilitation schemes that are due or open to insured persons in their own right. Widows and widowers enjoying insurances services and the types of benefits to orphans are similarly covered.

The closing section outlines legal protection by the social courts, which was regulated in Germany for the first time in 1953. The three-degree social courts function with subject judges in each degree. Furthermore, the volume describes ways in which insured persons may defend their rights before the court and addresses questions of procedure law.

The volume is closed which a very extensive and detailed subject index. Experts interested in labour law and social insurance law can make good use of this book, which is marked by objectivity and a readable style in its presentation of the current state of Germany's elaborate and meticulously drafted social insurance law and of the future reforms that are likely to be effected.

Miklós UDVAROS

ACTA JURIDICA HUNGARICA, Vol. 38

CONTENTS

STUDIES

KALEIDOSCOPE

BOOK REVIEW

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